CHAPTER 28

RIGHTS OF INCARCERATED PEOPLE WITH DISABILITIES*

A. Introduction

This Chapter explains the protections and legal rights available to incarcerated people with disabilities. As an incarcerated person with one or more disabilities—whether physical, cognitive, or both—you have legal rights based in the U.S. Constitution, federal civil rights laws, and some state laws. These laws forbid discrimination against you because of your disability.

This Chapter is divided into two parts. **Part B** of this Chapter explains the two major federal laws against disability discrimination: (1) Section 504 of the Rehabilitation Act of 1973 ("Section 504")[1] and (2) Title II of the Americans with Disabilities Act ("ADA," "Title II," or "ADA Title II").[2] Part B of this Chapter also explains what you need to prove in a legal claim under the ADA.[3] Your rights are mostly the same under Section 504 and Title II,[4] so you should consult both statutes and consider seeking relief under both.[5] **Part C** of this Chapter explains how to enforce your rights under both Section 504 and Title II. It explains what a court can and cannot order, taking into account some restrictions that have developed over the last decade.

If, because you have a disability, you either (1) are not receiving the services you need or (2) are being discriminated against, you may have a constitutional claim (in addition to Section 504 and Title II claims). For example, the way prison officials treat incarcerated people with disabilities—particularly in denying them medical care—can violate the Eighth Amendment's prohibition against "cruel and unusual punishment."[6] As an incarcerated person with disabilities, you also have important

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[1] Rehabilitation Act of 1973, 29 U.S.C. § 701, *amended by* 29 U.S.C. § 794.

[2] Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134.

[3] The ADA contains many sections, called "titles." Title II of the ADA is the most important ADA section for your claims. It protects you from disability discrimination by state and local government entities, including prisons and jails. Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Americans with Disabilities Act, 42 U.S.C. § 12132.

[4] Americans with Disabilities Act, 42 U.S.C. § 12133 (stating that the "remedies, procedures, and rights set forth in section 794a of [the Rehabilitation Act of 1973] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Title II of the ADA]").

[5] Section B(1) of this Chapter, below, explains the details of when you would seek relief under only one of these laws. Generally, you cannot not sue the federal government under the ADA. If you are in a privately run prison, you most likely can sue under Title II of the ADA, but you may also want to sue under Title III of the ADA. *See* notes 14–26 of this Chapter and accompanying text.

[6] *See, e.g.*, Allah v. Goord, 405 F. Supp. 2d 265, 275–277 (S.D.N.Y. 2005) (holding that a paraplegic incarcerated person stated an 8th Amendment claim in alleging that, while he was in his wheelchair, his wheelchair had been strapped into a vehicle too loosely, and thus he had been injured when the vehicle stopped suddenly); *see also* Lawson v. Dallas County, 286 F.3d 257, 263–264 (5th Cir. 2002) (holding that a prison's failure to provide a paraplegic incarcerated person with rehabilitation therapy, adequate toilet facilities, and a bed with an adequate mattress, despite being aware of the risks to his health, was medical neglect and inhumane treatment that violated the incarcerated person's 8th Amendment rights); LaFaut v. Smith, 834 F.2d 389, 392–394 (4th Cir. 1987) (holding that not offering prescribed rehabilitation therapy and adequate toilet facilities, despite awareness of the facilities' inadequacy, violated the 8th Amendment); Miller v. King, 384 F.3d 1248, 1261–1263 (11th Cir. 2004) (holding that allegations by a wheelchair-using paraplegic that he was denied wheelchair repairs, physical therapy, medical consultations, leg braces and orthopedic shoes, wheelchair-accessible showers and toilets,

constitutional rights to medical care. This Chapter does *not* talk about your constitutional rights. To learn more about your constitutional rights, including your right to adequate medical care, you should read *JLM*, Chapter 23, "Your Right to Adequate Medical Care," *JLM*, Chapter 26, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, MRSA, and COVID-19 in Prisons," and *JLM*, Chapter 29, "Special Issues for Incarcerated People with Mental Illness." Other Chapters especially useful for all incarcerated people include *JLM*, Chapter 4, "How to Find a Lawyer," *JLM*, Chapter 14, "The Prison Litigation Reform Act[7] *JLM*, Chapter 15, "Incarcerated Grievance Procedures," and *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

Although your protections under Section 504 and the ADA are limited by some court decisions, they are still important civil rights and anti-discrimination laws. Using these laws, incarcerated people with disabilities have won important victories in many federal judicial circuits, through both individual and class action suits. This Chapter will explain how you, as an incarcerated person with a disability, can use these laws to protect your rights.

B. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

1. Introduction

If you are an incarcerated person in a state or local facility and have one or more disabilities, Section 504[8] and Title II[9] are two different laws that protect you in similar ways. Section 504 was enacted by Congress in 1973. It applies both to the federal government and to state and local entities that receive federal funding.[10] In 1990, Congress passed the ADA, which expanded and strengthened Section 504's protections.[11] The language of Section 504 is very similar to the language of Title II; courts read them as prohibiting the same basic forms of discrimination.[12] You should start researching your claim by reading the two laws carefully, because most cases focus on how to interpret the laws. Since these two laws offer you similar protections, much of the discussion of Title II of ADA in this Chapter will apply to Section 504, and vice versa.

If you are an incarcerated person in a federal prison, or a non-citizen who is detained in a federal detention center, you can file suit only under Section 504. You cannot use the ADA because it cannot

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opportunity to bathe, urinary catheters, and assistance in using the toilet raised a material factual issue under the 8th Amendment), *vacated and superseded on other grounds*, Miller v. King, 449 F.3d 1149, 1150 (11th Cir. 2006).

[7] Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," is particularly relevant as it discusses restrictions on incarcerated people's lawsuits that could affect your § 504 or ADA claim.

[8] Rehabilitation Act of 1973, 29 U.S.C. § 701, *amended by* 29 U.S.C. § 794.

[9] Americans with Disabilities Act, 42 U.S.C. § 12131.

[10] 29 U.S.C.S. § 794.

[11] Carter v. Cain, 2019 U.S. Dist. LEXIS 27293, at *fn. 136 (M.D. La. Feb. 21, 2019) (*unpublished*) ("Passed in 1973, the. ADA expanded upon [Section 504 of the Rehabilitation Act's] protections.") In some areas of the law, the ADA provides much broader protections for persons with disabilities than § 504 does. For instance, the ADA specifically requires places like stores, restaurants, and banks to accommodate (make adaptations for) persons with disabilities. *See* 42 U.S.C. § 12181. The ADA also provides persons with disabilities protection against employment discrimination because of their disabilities. *See* 42 U.S.C. § 12112. But for prisons, jails, and state and local government entities, the ADA and § 504 give basically the same protections.

[12] Congress passed the ADA Amendments Act of 2008 because it was displeased that the courts were interpreting the definition of disability differently under the ADA than under § 504. The ADA Amendments Act states, "Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973" and that, in particular, the Supreme Court had "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), (7), 122 Stat. 3553, 3553. The result of this amendment is that it is now easier to meet the qualifications for having a disability than it was before 2008. Also, you may be more likely to win under the ADA if you win under § 504, since the two laws are now more similar. As a result of the new law, the Equal Employment Opportunity Commission (which defines, in its regulations, many of the terms you will use in your ADA suit) changed its definition of "substantially limits" to be interpreted "broadly in favor of expansive coverage," as it is "not meant to be a demanding standard." 29 C.F.R. § 1630.2(j)(1)(i) (2023).

be used to sue the federal government.[13] Also, if you sue a federal agency under Section 504, you can ask only for an injunction, not money damages.[14] An injunction is a court order requiring the prison or agency to stop and correct the violation.

Even if you are an incarcerated person in a privately-operated prison, you should probably bring suit under Title II. According to the Department of Justice regulations, Title II prohibits discrimination on the basis of one's disability when a service, program, or activity is provided directly by a public entity, as well as when it is provided indirectly by a public entity through a contract, license, or other arrangement.[15] The ADA defines "Public Entity" as "(1) any State or local government; (2) any department . . . or other instrumentality of a State or States or local government."[16] Many courts have found that Title II does not apply to claims against private prisons because such prisons do not meet the definition of public entity;[17] however, such cases frequently also find that the public entity (i.e., state or local government contracting with the private entity) still may have some responsibility for the actions of the private entity, on the grounds that the public entity cannot contract away its responsibility to avoid discrimination.[18]

If you are being held in a privately-run prison, you may also want to sue under Title III[19] of the ADA in case Title II arguments are rejected. Title II and Title III are very similar. While Title II prohibits discrimination on the basis of disability by public entities, Title III prohibits discrimination on the basis of disability by "any place of public accommodation."[20] More specifically, the implementing regulations for Title III state that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases

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[13] The ADA only protects against discrimination by a "public entity." 42 U.S.C. § 12132. The ADA defines "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A)–(B). This definition does not include agencies of the federal government. *See* Cellular Phone Taskforce v. FCC, 217 F.3d 72, 73 (2d Cir. 2000) (noting that the ADA does not apply to the federal government); AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL, U.S. DEPT. OF JUSTICE II-1.2000 (1993), *available at* http://www.ada.gov/taman2.html (last visited Feb. 25, 2024).

You can get Department of Justice (DOJ) printed materials on the ADA for free by contacting the DOJ by mail or phone. Publications are available in standard print and alternate format. Some publications are available in foreign languages. To order by mail, write to:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave., N.W.
Disability Rights Section -- NYAV
Washington, D.C. 20530.

In your letter, include the name of the publication you want. To order by phone, call the ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY). At these numbers, you can hear recorded information and order publications twenty-four hours a day. You can reach someone who can answer specific questions about the ADA, in English or Spanish, if you call on Mondays, Tuesdays, Wednesdays, and Fridays between 9:30 a.m. and 5:30 p.m. (Eastern Time) (and on Thursdays, when the hours are 12:30 p.m. to 5:30 p.m. (Eastern Time)).

[14] Lane v. Pena, 518 U.S. 187, 200, 116 S. Ct. 2092, 2100, 135 L. Ed. 2d 486, 498 (1996) (holding that Congress did not waive the federal government's immunity against monetary damages for violations of the Rehabilitation Act).

[15] 28 C.F.R. § 35.130(b)(1) (2023).

[16] 28 C.F.R. § 35.104 (2023).

[17] *See, e.g.*, Edison v. Douberly, 604 F.3d 1307,1310 (11th Cir. 2010) (holding that "a private corporation is not a public entity merely because it contracts with a public entity to provide some service."); *see also* Lee v. Corr. Corp. of Am., 61 F. Supp. 3d. 139, 142–144 (D.D.C. 2014) (holding that plaintiffs failed to state a claim against a "public entity" under Title II because defendant was a private prison company).

[18] *See, e.g.*, Wilkins-Jones v. County of Alameda, 859 F. Supp. 2d 1039, 1048 (N.D. Cal. 2012) (finding that the plaintiff could bring suit against the government when a private contractor with the government violated the ADA).

[19] 42 U.S.C. §§ 12181–12189.

[20] 42 U.S.C. § 12182(a).

to), or operates a place of public accommodation."[21] The Title III regulations define "place of public accommodation" as "a facility operated by a private entity whose operations affect commerce and fall within at least one of" several named categories.[22] Such categories include "place[s] of lodging," and "social service center establishment[s]."[23]

It is unclear whether the definition of public accommodation includes prisons, though many courts have found that prisons are not places of public accommodation for purposes of Title III.[24] While it appears unlikely that a Title III claim arising out of disability discrimination in a prison context will be successful, it may be nonetheless worth including a Title III claim, as such claims can be brought against private entities (avoiding the limitation of Title II).[25] One limitation on Title III claims is that individuals suing under Title III can seek only injunctive relief, not monetary damages.[26] Also, a prison sued under Title III can defend itself by arguing that accommodating your disability is not "readily achievable," meaning that the accommodation cannot be easily accomplished and is not able to be carried out without much difficulty or expense. When considering whether or not such accommodation is readily achievable, courts will consider several factors, including the facility's financial resources.[27]

(a) Section 504 of the 1973 Rehabilitation Act

Section 504 of the 1973 Rehabilitation Act states:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.[28]

Section 504 guarantees that anyone qualified to participate in a program, service, or activity will have meaningful access to it when it is offered either by the federal government or by a state or local recipient of federal funds.[29] Under Section 504, a "program or activity" is defined broadly to include

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[21] 28 C.F.R. § 36.201(a) (2023).

[22] 28 C.F.R. § 36.104 (2023).

[23] 28 C.F.R. § 36.104 (2023). Note, similar to "place of public accommodation", Title III specifies what kinds of locations are considered "place[s] of lodging."

[24] Livingston v. Beeman, 408 S.W.3d 566, 581 (Ct. App. Tex. 2013) (finding that Texas Department of Criminal Justice prison facilities do not fall into the definition of public facilities just because they are owned by the government); *see also* Edison v. Douberley, No. 2:05-cv-307-FtM-2 9SPC, 2008 U.S. Dist. LEXIS 68152, at *13 (M.D. Fla., Sep. 9, 2008) (*unpublished*) (finding that public accommodation under Title III does not include state prisons).

[25] Wilkins-Jones v. County of Alameda, 859 F. Supp. 2d 1039, 1047 (N.D. Cal. 2012) (affirming that Title III offers recourse against private entities).

[26] 42 U.S.C. § 12188(a).

[27] 42 U.S.C. § 12181(9)(A)–(D) lists the factors that courts take into consideration when assessing whether an accommodation is readily achievable. Those factors are: (A) "the nature and cost of the action needed under" the chapter; "(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity." 42 U.S.C. § 12181(9); *see also* 42 U.S.C. §12182(b)(2)(A)(iv)–(v).

[28] Rehabilitation Act of 1973, 29 U.S.C. § 794(a).

[29] Alexander v. Choate, 469 U.S. 287, 301, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661, 672 (1985) (noting that Section 504 requires state and local governments receiving federal aid to provide "meaningful access to the benefit" they offer), *superseded by statute on other grounds*, 28 C.F.R. §§ 35.160–35.164, 42.503(e)–(f) (2023).

"all of the operations of" a state or local government.[30] So, Section 504 applies not only to federal facilities, but also to any state, county, or city prison or jail that receives federal funding, either directly or through a state or local government.[31] It includes almost every state prison and many jails.[32]

(b) Title II of the Americans with Disabilities Act

A major ADA goal is to end disability discrimination by public and private actors.[33] The ADA has three main sections (called "Titles"), only one of which applies to state and local entities. If you pursue an ADA claim against a state prison or county jail, you will file under Title II, which applies to all state and local governments. The anti-discrimination protections provided by Title II and Section 504 are very similar, but the ADA has stronger regulations. Title II provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[34]

The ADA defines many of the terms in the above paragraph, including: "qualified individual with a disability,"[35] "disability,"[36] and "public entity."[37] However, the statute does not define the key phrase "services, programs, or activities." It is important that you understand how courts have interpreted and applied both the defined and the undefined terms of claims made by incarcerated people with disabilities. Parts B(3)–(5) of this Chapter will discuss these terms.

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[30] Rehabilitation Act of 1973, 29 U.S.C. § 794(b)(1)(A)–(B) (defining program or activity as "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government").

[31] Rehabilitation Act of 1973, 29 U.S.C. § 794(b); Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) ("We have held that" Section 504 "is applicable to prisons receiving federal financial assistance."); Bellamy v. Roadway Exp., Inc., 668 F. Supp. 615, 618 (N.D. Ohio 1987) (accepting the plaintiff's argument that "the term 'federal financial assistance' has been very broadly construed to encompass assistance of any kind, direct or indirect"); Jim C. v. United States, 235 F.3d 1079, 1081 (8th Cir. 2000) (noting that acceptance of funds by one state agency does not constitute a waiver by the entire state, which would make the whole state subject to suit).

[32] *See Know Your Rights: Legal Rights of Disabled Prisoners*, ACLU NAT'L PRISON PROJECT, 1 (Nov. 2012), *available at* https://www.aclu.org/files/assets/know_your_rights_--_disability_november_2012.pdf (last visited Feb. 24, 2024); *see also* Brief of the United States as Amicus Curiae at 2, Westcott v. Gardner, No. 1:96-CV-69-2 (M.D. Ga. Sep. 30, 1996), *available at* https://www.ada.gov/briefs/westcotbr.pdf (last visited Feb. 24, 2024) (arguing that the protections of "section 504 of the Rehabilitation Act do apply to inmates in state prisons because the statutes apply to all public entities and all recipients of federal financial assistance, respectively").

[33] Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (stating that one of the goals of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"). The ADA's implementing regulations also prohibits discrimination against you because of your association with a person with a disability. 28 C.F.R. § 35.130(g) (2023); Niece v. Fitzner, 922 F. Supp. 1208, 1216 (E.D. Mich. 1995) (finding a possible ADA violation when prison officials refused to make accommodations for an incarcerated person to communicate with his deaf fiancée).

[34] Americans with Disabilities Act, 42 U.S.C. § 12132.

[35] Americans with Disabilities Act, 42 U.S.C. § 12131(2) (defining "qualified individual with a disability" as anyone "with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

[36] Americans with Disabilities Act, 42 U.S.C. § 12102(1)(A)–(C) (defining "disability" as "a physical or mental impairment that substantially limits one or more of major life activities of [a person] . . . ; a record of such an impairment; or being regarded as having such an impairment").

[37] Americans with Disabilities Act, 42 U.S.C. § 12131(1)(A)–(B) (defining "public entity" as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government").

(c) Necessary Elements of Your Title II and Your Section 504 Claims

You must include several basic elements in your Title II or Section 504 complaint. If you do not, the court will dismiss your lawsuit. Fortunately, most of the elements are the same for both statutes, so a well-pleaded complaint under one statute will most likely meet the requirements of the other. For a court to accept your complaint, the complaint must set forth a claim for relief.[38] A court can throw out your complaint if it is not well-pleaded. A well-pleaded complaint must meet the requirements of Rule 8(a) of the Federal Rules of Civil Procedure (F.R.C.P.). According to F.R.C.P. 8(a):

> A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.[39]

More simply, you should write a clear statement that explains why the issue you face deserves the court's attention. In your statement, you should try to include what the prison did wrong, why you think you should get help under Section 504 or the ADA, and what you want the court to do about the problem. To state a Title II claim, your complaint must say that:

(1) You are an individual with a disability;
(2) You are "qualified to participate in or receive the benefit of" the particular service, program, or activity at the prison or jail that discriminated against you;
(3) You were excluded from participation in or denied the benefits of the service, program, or activity at your prison/jail, or you were discriminated against in some other way; and
(4) This exclusion, denial of benefits, or discrimination was because of your disability.[40]

A claim under Section 504 has one additional requirement. Section 504 covers all federal facilities, but only those state and local facilities that receive federal funding. So your complaint must state that the facility receives federal funding.[41]

Your Section 504 complaint must say that:

(1) You are an individual with a disability;
(2) You are "otherwise qualified" for the program, activity, or service you were excluded from;
(3) You were denied benefits or discriminated against solely because of your disability; and
(4) The program, activity, prison, or jail receives federal financial assistance.[42]

Of course, you should make sure to list the four facts listed above. However, your complaint should also include other information, both to make your situation clear and to get the judge to sympathize with the problems you face in prison. You should (1) discuss your disability in detail, (2) explain the

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[38] FED. R. CIV. P. 8.

[39] For a case in which the court addresses the meaning of "well-pleaded complaint," see, e.g., Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–556, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 940 (U.S. 2007).

[40] *See, e.g.*, Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002) (discussing the requirements for an ADA Title II claim).

[41] *See, e.g.*, Thomas v. Nakatani, 128 F Supp.2d 684, 694–695 (dismissing a Section 504 claim because it did not allege the state agency received federal funds); Hamilton v. Illinois Cent. R.R., 894 F. Supp. 1014, 1022 (S.D. Miss. 1995) (dismissing a Section 504 claim because the plaintiff failed to allege the private facility received federal funds). When you file your complaint, you may not know whether the jail or prison receives federal funding (this is something you should learn during the discovery phase of your court case). When you are giving the court documents about something you believe, but do not know for certain, to be true, you should begin your statement with the phrase, "Upon information and belief." For example, in your Section 504 complaint, you could say, "Upon information and belief, the prison I am suing receives federal funding."

[42] Doe v. Pfrommer, 148 F. 3d 73, 82 (2d Cir. 1998) (describing the essential elements of a Section 504 claim).

accommodations you need, and (3) describe the discrimination you have experienced. You should also mention any other facts you think are relevant and will make your argument stronger.

If your claim is about physical access within a prison or jail, your Section 504 claim should point out that the prison or jail is in violation of a statute that has been the law for more than forty years. By pointing this out, you will be showing that the prison or jail has little basis for arguing that it did not know it had to be accessible to individuals with disabilities.

Many of the terms above will be explained later in detail. For now, know that the ADA and Section 504 are anti-discrimination laws, so your complaint should be clear as to how prison staff have discriminated against you because of your disability. The rest of Part B of this Chapter shows how courts have interpreted the ADA and Section 504 in the prison context.

2. What Qualifies as Discrimination under the ADA?

The ADA regulations describe certain actions taken by public entities as "discrimination" under the ADA. The categories are broad, and they clarify what the ADA prohibits. Keeping in mind the main goals of the ADA—(1) preventing discrimination, (2) integrating people with disabilities into "mainstream" society, and (3) providing strong and consistent enforceable standards addressing disability discrimination[43]—can help you understand why particular actions are considered discrimination. The following paragraphs discuss types of actions that the ADA describes as discriminatory.

According to the ADA, it is discrimination for public entities to deny an otherwise qualified person with a disability "the opportunity to participate in or benefit from" a program or service solely because of his disability.[44] For instance, if you meet the requirements for participating in a job-training program, the prison cannot exclude you from the program just because of your disability.[45]

According to the ADA, it is discrimination for public entities, like prisons and jails, to offer individuals with disabilities any benefits or services that are worse than those offered to individuals without disabilities.[46] For instance, the ADA prohibits prisons from providing only one therapy session per week to a paraplegic incarcerated person, while providing two therapy sessions per week to incarcerated people without this disability (if the disability is the reason for providing fewer sessions). Similarly, if a prison offers GED classes for individuals with hearing disabilities, it cannot offer those individuals a lower-quality program than it offers to individuals without hearing disabilities. That said, the ADA does not prohibit the prison from canceling both programs.

According to the ADA, a prison can only provide "different or separate aids, benefits, or services" to individuals with disabilities if the programs *must* be separate to be effective.[47] In addition, the prison cannot exclude individuals with disabilities from other programs just because special programs are available for persons with disabilities.[48]

According to the ADA, a public entity also discriminates if it provides "significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program."[49] So if a state or local government provides "significant assistance" to a prison—including a private prison—that discriminates on the basis of disability, then the state or local government can be in violation of the ADA. If you are in a

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[43] Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1)–(8), (b)(1)–(2).

[44] 28 C.F.R. § 35.130(b)(1)(i) (2023).

[45] *See, e.g.*, Montez v. Romer, 32 F. Supp. 2d 1235, 1237–1240 (D. Colo. 1999) (holding the incarcerated individual could not participate in vocational training because the prison did not accommodate his disabilities).

[46] 28 C.F.R. § 35.130(b)(1)(ii) (2023).

[47] 28 C.F.R. § 35.130(b)(1)(iv) (2023); *see also* 28 C.F.R. Pt. 35, App. A, at 527 (2023), which explains that the DOJ "recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted."

[48] 28 C.F.R. § 35.130(b)(2) (2023).

[49] 28 C.F.R. § 35.130(b)(1)(v) (2023).

private prison, this type of claim will help you sue the state or local entity that contracts with the prison.

According to the ADA, in the administration of programs, it is discrimination for public entities to use criteria or methods of administration that defeat or substantially impair the accomplishment of the program's objectives with respect to people with disabilities.[50] In other words, a prison cannot run its programs in a way that keeps incarcerated people with disabilities from being able to participate, even if disabled incarcerated people are not explicitly excluded. For instance, if a visually impaired incarcerated person could not enroll in a business class because the print on the enrollment application was too small for him to read, this would be discrimination. The prison would have to provide the incarcerated person with a way to enroll in the business class.

Although the ADA regulations prohibit the above forms of discrimination in prisons, not all of these examples have appeared in lawsuits filed by incarcerated people. You may have to argue by analogy (comparison) to cases that describe discrimination in other areas, like employment.

3. What is a Disability under the ADA and Section 504?

Under both the ADA and Section 504, you have a disability if: (1) a physical or mental impairment substantially limits one or more of your major life activities, (2) you have a record of such an impairment, or (3) you are regarded as having such an impairment.[51] If you satisfy any of these tests, you are considered an individual with a disability under the ADA and Section 504. If you currently have a disability, such as an uncorrectable hearing impairment, you would be disabled under the first test. Under the second test, you might be considered disabled if, for example, you once had cancer that substantially limited your ability to care for yourself, but the cancer is now in remission.[52] Finally, you may have a claim under the third test if prison officials discriminate against you because they believe you have a mental impairment that substantially limits your ability to learn when, in fact, you do not have a mental impairment, or you have an impairment but it does not substantially limit your ability to learn.[53]

The definition of "disability" has two parts. First, the disability at issue must be a physical or mental impairment. The meaning of "physical or mental impairment" is explored in Subsection (a) below. Second, the impairment must substantially limit one or more major life activities. The meanings of "substantially limits" and "major life activity" are discussed in Subsection (b).

(a) What is a "Physical or Mental Impairment"?

The ADA implementing regulations (rules spelling out the details of the law), from the U.S. Department of Justice ("DOJ"), define a "physical or mental impairment" to include a wide range of

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[50] 28 C.F.R. § 35.130(b)(3)(ii) (2023).

[51] Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(B); Americans with Disabilities Act, 42 U.S.C. § 12102(1). Most of the cases establishing the list of disabilities that qualify for ADA antidiscrimination protection have been employment discrimination lawsuits. Those suits may be useful to your case even though you are not suing as an employee. Many incarcerated people have brought ADA discrimination suits that rely on the outcomes of similar ADA suits filed by people who are not incarcerated. This is because the right of a disabled person to be free from discrimination is a right that he can enforce in many situations, including when he is an employee, or when he is incarcerated. *See, e.g.*, Carter v. Taylor, 540 F. Supp. 2d 522, 528 (D. Del. 2008) (citing Toyota Motor Mfg. Inc. v. Williams, 534 U.S. 184, 198, 122 S. Ct. 681, 692, 151 L. Ed.2d 615, 632 (2002)) (applying the "case-by-case manner" standard from *Williams*, an ADA employment discrimination suit, to an incarcerated person's ADA disability claim); Smith v. Masterson, 538 F. Supp. 2d 653, 657 (S.D.N.Y. 2008) (citing Colwell v. Suffolk Cnty. Police Dept., 158 F. 3d 635, 641 (2d Cir. 1998) (adopting the "major life activity" requirement from an employment suit for a suit by an incarcerated person).

[52] *See*, *e.g.*, EEOC v. R.J. Gallagher Co., 181 F. 3d 645, 655–656 (5th Cir. 1999) (noting that a man with a record of cancer may have a disability under the ADA if the cancer or treatment substantially limited him in one or more major life activities). *But see* Shaw v. Greenwich Anesthesiology Assocs., 137 F. Supp. 2d 48, 58 (D. Conn. 2001) (rejecting the analysis in *R.J. Gallagher Co.* and requiring that the plaintiff suffer from a disability *currently*).

[53] Milholland v. Sumner County Bd. of Education, 569 F. 3d 562, 566–567 (6th Cir. 2009) (reading the 2008 ADA Amendments as expanding the Act's reach to include cases where "[an] individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*") (emphasis added).

physical and mental conditions. More specifically, the regulations define physical or mental impairment as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine . . . [or] [a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[54] The regulations also list specific things that qualify as physical or mental impairments. More specifically, the regulations state that the phrase "physical or mental impairment" includes, but is not limited to, contagious and non-contagious diseases and conditions such as: orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, and diabetes; mental retardation, emotional illness, and specific learning disabilities; HIV (whether symptomatic or asymptomatic) and tuberculosis; drug addiction and alcoholism.[55]

If you are HIV-positive, you should note that the definition of physical impairment includes asymptomatic, undetectable, or un-transmittable HIV (testing positive for HIV, but not showing symptoms).[56] For example, if you are asymptomatic HIV-positive and the prison denies you trustee status because you have HIV, you may have Title II and Section 504 claims.[57]

Drug addiction is also considered an impairment, but not if you are currently addicted. If you have stopped using drugs and have completed or are participating in a drug rehabilitation program, the prison cannot discriminate against you on the basis of your past drug addiction.[58] However, the laws and regulations do not prohibit discrimination based on your *current* illegal use of drugs.[59]

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[54] 28 C.F.R. §§35.108(b)(1)–(2) (2023).

[55] 28 C.F.R. § 35.108(b)(2) (2023).

[56] 28 C.F.R. § 35.108(b)(2) (2023); *see* Bragdon v. Abbott, 524 U.S. 624, 637–641, 118 S. Ct. 2196, 2204–2207, 141 L. Ed.2d 540, 556–559 (1998) (holding that (1) under the ADA, HIV infection is a physical impairment "from the moment of infection," and (2) in this case, an asymptomatic HIV-positive woman was disabled under the ADA).

[57] Harris v. Thigpen, 941 F. 2d 1495, 1524 (11th Cir. 1991) (holding that HIV-positive status is a disability under Section 504 because the correctional system treated HIV-positive people as if they were disabled); Dean v. Knowles, 912 F. Supp. 519, 522 (S.D. Fla. 1996) (allowing an asymptomatic HIV-positive incarcerated person to go forward with a discrimination suit against prison officials who denied him trustee status, a status granting incarcerated people who have proven themselves trustworthy the opportunity to assist in the operation of the jail or prison in exchange for certain privileges).

[58] 28 C.F.R. § 35.131(a)(2)(i)–(iii) (2023) ("A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully; (ii) Is participating in a supervised rehabilitation program; or (iii) Is erroneously regarded as engaging in such use.").

[59] 28 C.F.R. § 35.131(a)(1) (2023) ("[T]his part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs."). Similar language is used in § 504. Rehabilitation Act of 1973, 29 U.S.C. §705(20)(C)(i). "Current illegal use of drugs" is defined as the illegal use of drugs "recent[ly] enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem." 28 C.F.R. § 35.104(4) (2023). According to the regulation, "[t]he term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use." 28 C.F.R. § 35.104(4) (2023).

Other conditions and diseases that courts have found *could be* physical or mental impairments include: asthma,[60] deafness and other hearing impairments,[61] quadriplegia,[62] paraplegia,[63] amputations or artificial limbs,[64] certain stomach and digestive problems,[65] blindness or other vision impairments,[66] degenerative disk condition[67] and other disabilities. In many of the cases in the footnotes below (dealing with possible impairments), the court either did not decide whether the individual was disabled, or ruled that the plaintiff was not disabled at all. These cases simply give examples of the types of impairments courts have said *could* qualify as disabilities—as long as the claims were backed up with facts, and the impairment substantially limited the individual in a major life activity. (What it means to be *substantially limited* in a *major life activity* is discussed in Subsection (b) below.)

Being gay, lesbian, bisexual, or transgender is not a "physical or mental impairment" under the ADA.[68] (For information on special issues for incarcerated people who identify as gay, lesbian, bisexual, transgender, and transsexual, see Chapter 30 of the *JLM,* "Special Information for Lesbian, Gay, Bisexual, Transgender, and/or Queer Incarcerated People.") Furthermore, the ADA regulations explicitly exclude certain "conditions"—including "transvestism, transsexualism," "sexual behavior disorders," and "gender identity disorders not resulting from physical impairments"[69]—from the definition of "physical or mental impairment" or "disability."[70] If you file a complaint in federal court

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[60] *See, e.g.*, King v. England, No. 3:05CV949 (MRK), 2007 U.S. Dist. LEXIS 45345, at *17–21 (D. Conn. June 22, 2007) (*unpublished*) (listing different cases surrounding asthma in multiple jurisdictions and the different approaches regarding the ADA's applicability to asthmatics); McIntyre v. Robinson, 126 F. Supp. 2d 394, 408 (D. Md. 2000) (noting that although asthma can be considered a disability in the prison context, it is especially subject to case-by-case analysis because it is an easily controlled ailment).

[61] *See, e.g.*, Duffy v. Riveland, 98 F.3d 447, 454–455 (9th Cir. 1996) (finding that a deaf incarcerated person was disabled under the ADA and § 504, and allowing him to go forward with claim against prison for failure to provide a qualified interpreter in prison disciplinary and classification hearings); Calloway v. Glassboro Dept. of Police, 89 F. Supp. 2d 543, 554–556 (D.N.J. 2000) (finding that a deaf person who was arrested could go forward with her ADA and Section 504 case for failure to provide a qualified interpreter during questioning at the police station); Niece v. Fitzner, 922 F. Supp. 1208, 1217–1218 (E.D. Mich. 1995) (recommending that an incarcerated person be allowed to proceed with his case against the department of corrections for failure to provide a Telecommunications Device for the Deaf ("TDD"), which would allow him to communicate with his deaf girlfriend over the phone); Clarkson v. Coughlin, 898 F. Supp. 1019, 1036–1038 (S.D.N.Y. 1995) (finding that a prison's failure to accommodate hearing-impaired incarcerated people violated the ADA and § 504).

[62] *See, e.g.*, Love v. Westville Corr. Ctr., 103 F. 3d 558, 560 (7th Cir. 1996) (affirming damages award to a quadriplegic incarcerated person who was denied access to prison programs based on his disability).

[63] *See, e.g.*, Pierce v. County of Orange, 526 F. 3d 1190, 1214–1222 (9th Cir. 2008) (finding that an incarcerated person with paraplegia could go forward with his ADA claim).

[64] *See, e.g.*, Schmidt v. Odell, 64 F. Supp. 2d 1014, 1032–1033 (D. Kan. 1999) (finding that a double amputee could proceed with his ADA and § 504 claims that he was denied the benefit of some basic jail services because of his disability); Kaufman v. Carter, 952 F. Supp. 520, 533 (W.D. Mich. 1996) (refusing to issue summary judgment against a double amputee because of conditions alleged in his complaint); Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 U.S. Dist. LEXIS 21063, at *10 (M.D. Ala. Apr. 27, 1993) (*unpublished*) (noting that the defendant agreed that an incarcerated person with an artificial leg was a "qualified individual with a disability").

[65] *See, e.g.*, Scott v. Garcia, 370 F. Supp. 2d 1056, 1074–1075 (S.D. Cal. 2005) (holding that eating is a major life activity, and a plaintiff with stomach and digestive problems raised a material factual issue under the ADA when he submitted evidence that he was denied access to the prison meal service by not being given enough time to eat or the option to eat smaller, more frequent meals).

[66] *See, e.g.*, Williams v. Ill. Dept. of Corr., No. 97 C 3475, 1999 U.S. Dist. LEXIS 18190, at *15–16 (N.D. Ill. Nov. 16, 1999) (*unpublished*) (holding that the incarcerated plaintiff's extreme myopia constituted a disability where the defendant agreed that the condition was disabling); Armstrong v. Davis, 275 F. 3d 849, 857–863 (9th Cir. 2001) (finding that a parole board provided inadequate accommodations for visually impaired incarcerated people during the parole process, and that this constituted a valid part of an ADA claim).

[67] *See, e.g.*, Saunders v. Horn, 960 F. Supp. 893, 901 (E.D. Pa. 1997) (finding that an incarcerated person with degenerative disk disorder stated a claim under Section 504 and the ADA).

[68] 28 C.F.R. § 35.108(b)(3), (g) (2023).

[69] 28 C.F.R. § 35.108(g) (2023).

[70] 28 C.F.R. § 35.108(a)–(b), (g) (2023).

alleging that one of these conditions or identities is a disability, the court will almost certainly dismiss your case.[71] However, one of these conditions or identities may be considered a disability under state law; you should consult statutes and case law for the state in which you live.

(b) When Is an Impairment a Disability?

To be considered disabled under the ADA and Section 504, it is not enough for you to have a physical or mental impairment. The impairment has to substantially limit you in at least one major life activity.[72] The decision of whether an impairment substantially limits a major life activity or not is made on a case-by-case basis. In other words, the court will look at how an impairment limits *you*, and not at how an impairment usually limits a person.[73] If you have an impairment that affects different people in different ways, you must show that your particular limitation is substantial in your own case.[74]

The impairment does not have to be current. If you are discriminated against because you have a record of an impairment, that is still considered discrimination under the ADA.[75] A record of an impairment is when you have a history of having an impairment that substantially limits a major life activity, or when you have been misclassified as having an impairment that substantially limits a major life activity.[76] In addition, even if you have no history of the impairment, you are disabled under the ADA if you are "regarded as having such an impairment."[77] You will be "regarded as having such an impairment" if you are discriminated against because of an actual or perceived disability, whether or not that disability limits or is perceived to limit you in a major life activity.[78]

Under the ADA Amendments Act of 2008, Congress has tried to make clear what "substantially limits" means. The Act says that an impairment can count as a disability even if it (1) only substantially limits you in *one* major life activity, or (2) is episodic or in remission, *if* it would substantially limit you in at least one major life activity if it were active.[79] Additionally, the ADA Amendments Act of 2008 rejects earlier Supreme Court decisions that said "substantially limits" must be interpreted strictly, as to mean the impairment must "prevent" or even "severely or significantly restrict" an individual. The ADA Amendments Act of 2008 suggested that the standard for "substantially limits" should be broad, the ability to ease the hardships of the impairment shouldn't be considered, and courts should not extensively analyze "substantially limits" in ADA cases.[80]

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[71] See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for a discussion of the "three strikes rule" and other negative consequences of filing a suit that is dismissed.

[72] Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(B); Americans with Disabilities Act, 42 U.S.C. § 12102(1)–(2); 28 C.F.R. § 35.108 (2023).

[73] Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566, 119 S. Ct. 2162, 2169, 144 L. Ed. 2d 518, 530 (1999) (noting that there is a "statutory obligation to determine the existence of disabilities on a case-by-case basis"), *superseded by statute,* ADA Amendments Act of 2008, Pub. L. 110–325, 122 Stat. 3553. Although *Albertson's, Inc.* was superseded by the 2008 ADA amendments, courts are still obligated to examine disabilities claims on an individual basis. 42 U.S.C. § 12102.

[74] Gillen v. Fallon Ambulance Servs., Inc., 283 F. 3d 11, 24 (1st Cir. 2002) (noting that an individual bringing an ADA claim must give evidence that a major life activity has been impaired); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566, 119 S. Ct. 2162, 2169, 144 L. Ed.2d 518, 530–531 (1999) (noting that some impairments may limit people's major life activities in different ways and to different degrees)*, superseded by statute,* ADA Amendments Act of 2008, Pub. L. 110–325, 122 Stat. 3553.

[75] 28 C.F.R. § 35.108(a)(1)(i)–(ii) (2023) ("*Disability* means . . . [a] physical or mental impairment that substantially limits one or more of the major life activities . . . [or] a record of such impairment.").

[76] A Helping Hand, LLC v. Baltimore County, No. CCB-02-2568, 2005 U.S. Dist. LEXIS 22196, at *46 (D. Md. Sept. 30, 2005) (*unpublished*) ("[T]he phrase *has a 'record of' such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.") (emphasis added) (citing 28 C.F.R. § 35.104).

[77] Saunders v. Horn, 959 F. Supp. 689, 697 (E.D. Penn. 1996) (citing 42 U.S.C. §12102(2)).

[78] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3, 122 Stat. 3553, 3555 (2008).

[79] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3, 122 Stat. 3553, 3556 (2008).

[80] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b)(4), 122 Stat. 3553–3554 (2008).

When considering whether an impairment substantially limits a major life activity, courts are not allowed to assume that having certain aids, including medication, medical supplies, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics, hearing aids, mobility devices, oxygen therapy equipment, assistive technology, and auxiliary aids and services (such as interpreters and readers), makes it such that you are not substantially limited in a major life activity.[81] The one exception is that courts will consider the effect of ordinary eyeglasses or contact lenses when considering whether a visual impairment substantially limits a major life activity.[82]

When you start doing legal research to help you argue that your impairment counts as a disability, you will probably find that most of the cases discussing the term "substantially limits" have been about employment discrimination, which falls under a different ADA section: Title I.[83] Courts considering whether an impairment substantially limits a major life activity for an incarcerated person frequently look to Title I cases and regulations for guidance.[84] Right now, the regulations for Title I set forth nine rules to be used in determining whether an impairment substantially limits a major life activity.[85] The rules state that:

> (i) The term "substantially limits" shall be construed broadly . . . [and is] not meant to be a demanding standard.
> (ii) An impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. . . .
> (iii) The primary object of attention . . . should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.
> (iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the [ADA Amendments Act].
> (v) The [analysis] of an individual's performance of a major life activity . . . usually will not require scientific, medical, or statistical analysis. . . .
> (vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the [effects of certain aids other than ordinary eyeglasses and contact lenses]. . . .
> (vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
> (viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.
> (ix) . . . The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.[86]

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[81] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3(4)(E)(i), 122 Stat. 3556 (2008).

[82] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3(4)(E)(ii), 122 Stat. 3556 (2008).

[83] Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117 (Title I of the ADA, covering discrimination in private employment).

[84] *See, e.g.*, Mingus v. Butler, 591 F.3d 474, 482 (6th Cir. 2010).

[85] 29 C.F.R. § 1630.2(j)(1) (2023).

[86] 29 C.F.R. § 1630.2(j)(1) (2023).

After the ADA Amendments Act of 2008, courts have interpreted "substantially limits" more broadly. A seven-month-long impairment, which previously was not long enough to qualify, was found to be substantially limiting because under the ADA Amendments Act of 2008, temporary impairments can be substantially limiting.[87] Since "substantially limits" is viewed expansively, courts recognize that the test for "substantially limits" is easier to meet than in cases before the ADA Amendments Act of 2008,[88] though they occasionally conclude that "minor impairments" are excluded from coverage.[89] While there have been a few cases that define "substantially limits" in a prison disability context after the enactment of the ADA Amendments Act, many cases since its enactment have used the Title I regulations listed above. So you should consider those regulations when determining whether or not your disability "substantially limits" a major life activity.

The Supreme Court has defined "major life activities" as "activities that are of central importance to [most people's] daily li[ves]."[90] Under the ADA Amendments Act of 2008, major life activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[91] For example, if you have vision problems and cannot read regular-sized print, or require braille materials, then your condition limits the major life activity of seeing. The 2008 Act states that major life activities also include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[92] Courts have found other important activities, such as eating[93] and reproduction,[94] to be major life activities.

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[87] Summers v. Altarum Inst., Corp., 740 F.3d 325, 330 (4th Cir. 2014).

[88] *See, e.g.*, Matthews v. Pa. Dept. of Corr., 613 F. App'x 163, 167–168 (3d Cir. 2015) (*unpublished*); Borwick v. Univ. of Denver, 569 F. App'x 602, 604–605 (10th Cir. 2014) (*unpublished*); Neely v. PSEG Tex., Ltd. P'ship, 735 F.3d 242, 245 (5th Cir. 2013); Kravtsov v. Town of Greenburgh, No. 10-CV-3142 (CS), 2012 U.S. Dist. LEXIS 94819, at *35 (S.D.N.Y. July 9, 2012) (*unpublished*); Anderson v. Nat'l Grid, PLC, 93 F. Supp. 3d 120, 135 (E.D.N.Y. 2015).

[89] *See, e.g.*, Steele v. Stallion Rockies, LTD, 106 F. Supp. 3d 1205, 1219 (D. Colo. 2015) (finding that the plaintiff's Lumbar Degenerative Disc Disease did not substantially impair a major life activity); Clark v. W. Tidewater Reg'l Jail Auth., No. 2:11cv228, 2012 U.S. Dist. LEXIS 9497, at *21–22 (E.D. Va. 2012) (*unpublished*) (finding that a three week restriction on the ability to stand for prolonged periods of time was not a substantial limitation on the major life activity of standing).

[90] Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 197, 122 S. Ct. 681, 691, 151 L. Ed.2d 615, 631 (2002) (holding that, to be considered substantially limited in performing manual tasks, an "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives"). But Congress has used the ADA Amendments Act of 2008 to criticize the Supreme Court on this point. The new law rejects the Court's ruling "that the terms 'substantially' and 'major' . . . need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554 (2008). Newer cases have found that "the ADA Amendments Act's . . . regulations indicate that a substantial limitation need not severely restrict an individual's ability to perform a major life activity," but that "minor impairments" are not considered substantial limitations on major life activities. Clark v. Western Tidewater Reg'l Jail Auth., No. 2:11cv228, 2012 U.S. Dist. LEXIS 9497, at *21 (E.D. Va. 2012) (*unpublished*). In other words, now that Congress has stepped in to protect the rights of people with disabilities, many courts are no longer using the *Toyota* standard to determine whether a major life activity is substantially impaired.

[91] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3(2)(A), 122 Stat. 3553, 3555 (2008).

[92] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3(2)(B), 122 Stat. 3553, 3555 (2008).

[93] Scott v. Garcia, 370 F. Supp. 2d 1056, 1074 (S.D. Cal. 2005) (holding that while eating is a major life activity, a plaintiff with stomach and digestive problems must show that his dietary restrictions are serious enough to constitute a disability).

[94] Bragdon v. Abbott, 524 U.S. 624, 637–642, 118 S. Ct. 2196, 2204–2207, 141 L. Ed. 2d 540, 556–559 (1998) (holding that an asymptomatic HIV-positive woman had a disability because her HIV infection substantially limited her ability to reproduce, but refusing to decide whether HIV infection is always a disability under the ADA); Mullen v. New Balance Ath., Inc., No. 1:17-cv-194-NT, 2019 U.S. Dist. LEXIS 30967, at *12 (D. Me. Feb. 27, 2019) (*unpublished*) (noting that reproduction is a major life activity under the ADA)

Note that the ADA Amendments Act includes "working" as a major life activity. Previously, the Supreme Court had questioned this determination, at least in employment discrimination cases.[95] The pre-2008 test for whether you were substantially limited in your ability to work required that you be limited in performing a "class of jobs" that made use of your skills, not just a "single, particular job."

The Title I regulations that apply to employment discrimination, and have been used by courts in disability discrimination context for incarcerated people, further define working as a major life activity. The regulations keep the original "class or broad range of jobs" standard but explain how the standard must be applied differently. They state: "the determination of whether a person is substantially limited in working is more straightforward and simple than it was prior to the Act."[96] The broader category of "major life activity," means that even if you cannot show substantial impairment of your ability to work, you will often be able to show substantial impairment of another major life activity.[97] Because of this, the major life activity of working will probably be used less frequently. Nonetheless, the Title I regulations state that you can show substantial impairment of the major life activity of working by "showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities."[98] This standard, while similar to the older standard used by courts, is less strict. That said, showing substantial impairment in "performing the unique aspects of a single specific job is not sufficient."[99] A court may define a class of jobs by looking at the nature of the work (e.g., food service jobs or clerical jobs), or at the job–related requirements (e.g., heavy lifting or driving).[100]

In the prison context, the "substantially limits" and "major life activities" requirements are not usually a focus in ADA and Section 504 cases. If you sue the prison or prison officials, alleging discrimination on the basis of your disability, the case likely will focus on whether you are (1) a "qualified individual with a disability," and (2) whether you were "excluded from participation in or . . . denied the benefits of the services, programs, or activities" of the prison, or discriminated against by the prison.[101] The next two Sections discuss how courts interpret these questions in your disability discrimination claim.

(c) Who is a Qualified Individual under the ADA and Section 504?

Unfortunately, not everybody who has a disability under the ADA and Section 504 is protected from discrimination. The ADA and Section 504 prohibit discrimination based on your disability only if you are a "*qualified individual* with a disability."[102] The ADA defines the phrase "qualified individual with a disability" as:

> An individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the

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[95] Sutton v. United Air Lines, Inc., 527 U.S. 471, 492, 119 S. Ct. 2139, 2151, 144 L. Ed. 2d 450, 468–469 (1999) (noting that "there may be some conceptual difficulty in defining 'major life activities' to include work").

[96] 29 C.F.R. § Pt. 1630, App. (2023).

[97] *See, e.g.*, Corley v. Dept. of Veterans Affairs *ex rel.* Principi, 218 F. App'x 727, 738 (10th Cir. 2007) (*unpublished*) (finding no substantial impairment of major life activity of working for employee with seizure disorder when employee was not foreclosed from certain jobs; employee would now be limited in neurological function according to Title I Regulations.).

[98] 29 C.F.R. § Pt. 1630, App. (2023).

[99] 29 C.F.R. § Pt. 1630, App. (2023).

[100] 29 C.F.R. § Pt. 1630, App. (2023).

[101] Americans with Disabilities Act, 42 U.S.C. § 12132; *see also* Rehabilitation Act of 1973, 29 U.S.C. § 794(a).

[102] Americans with Disabilities Act, 42 U.S.C. § 12132; Rehabilitation Act of 1973, 29 U.S.C. § 794(a).

> essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[103]

In addition to having a disability, you also must be eligible to participate in or benefit from a particular program, service, or activity. If you decide to file suit under the ADA or Section 504, your complaint must include: (1) generally what your disability is, and (2) that you are a "qualified individual with a disability" within the meaning of the ADA and Section 504. In its answer to your complaint, the prison might say that even if you have a disability, you are not a qualified individual. If the prison convinces the court that you are not a qualified individual, the court will dismiss your case.

The fact that you are an incarcerated person does not mean you are disqualified from programs or services. The Supreme Court has firmly established that an incarcerated person is not excluded from being a qualified individual with a disability just because they are in prison.[104] Incarcerated people are covered by the ADA and Section 504 if they can meet the definition of disability discussed in Section B(3), above, and can show that they are qualified individuals.

The definition of "qualified individual" has several parts, each of which the prison might use to try to defeat your case. Below, Subsection (a) explains what it means generally to be a "qualified individual with a disability." Subsection (b) describes the meaning of "reasonable modifications" and the factors courts consider when deciding what is reasonable. Subsection (c) discusses auxiliary aids and services. Subsection (d) addresses the removal of barriers.

(d) Who is a "Qualified Individual with a Disability?"

To be a "qualified individual with a disability," you must meet "the essential eligibility requirements for . . . participation in programs or activities."[105] For example, if incarcerated people convicted of a certain offense are not allowed to participate in work release, then a person with a disability who is convicted of that offense is not "qualified" for that program.

There are some situations in which you will not be considered a qualified individual even if you meet program or activity requirements. You are not a qualified individual if the prison can show that, because of your disability, your participation makes you a "direct threat to the health or safety of others."[106] The appendix to the DOJ's Title II regulations defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."[107]

If prison officials are trying to decide whether someone with a disability poses a direct threat, they must determine "the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will" reduce or eliminate the risk.[108] (The meaning of "reasonable modifications" is discussed in Subsection (b), below.) In making this determination, prison officials must use "reasonable judgment that relies on current medical evidence or on the best available objective evidence."[109] The prison may *not* rely on "generalizations or stereotypes about the effects of a disability"—instead, it must assess the individual with the disability.[110]

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[103] Americans with Disabilities Act, 42 U.S.C. § 12131(2) (defining "qualified individual with a disability").

[104] Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210–211, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219–220 (1998) (holding that people incarcerated by the state are protected by the ADA).

[105] Americans with Disabilities Act, 42 U.S.C. § 12131(2).

[106] 28 C.F.R. § 35.139 (2023) (analyzing the ADA Title II regulations).

[107] 28 C.F.R. § 35.104 (2023).

[108] 28 C.F.R. § 35.139(b) (2023).

[109] 28 C.F.R. § 35.139(b) (2023).

[110] 28 C.F.R. § 35.104 (2023).

Courts use the direct threat analysis in Title II and Section 504 cases even though the direct threat language is not clearly stated in the laws.[111] The direct threat argument is a defense the prison may raise. Because the argument is a defense, the prison will have the burden of showing that you are a direct threat.[112] If the court accepts the prison's defense that you are a direct threat, you will not be considered a qualified individual.

The direct threat defense to discrimination often comes up for people with infectious diseases, especially HIV. A few courts have decided that incarcerated people who are HIV-positive, although they are "individuals with a disability," are not "qualified" for various prison programs or activities.[113]

For example, in *Onishea v. Hopper*, the Eleventh Circuit rejected constitutional and Section 504 claims of incarcerated people who were not allowed to participate in prison recreational, religious, and educational programs because they were HIV-positive.[114] These incarcerated people could participate only in a limited number of programs, which were separate from the programs available to the general population.[115] The lower court had ruled that the HIV-positive incarcerated people were not "otherwise qualified" to participate in programs with the general population because of the possibility of high-risk behaviors like violence, intravenous drug use, and sex.[116] The Eleventh Circuit agreed, finding that the risk of HIV transmission is "significant" because of the severe consequences of HIV infection, even if the probability of transmission is low.[117]

The *Onishea* opinion allows a prison to disqualify HIV-positive incarcerated people from participating in many programs, and significantly reduces Section 504 and Title II protections for these incarcerated people.[118] The *Onishea* court claimed to require judges to make program-by-program decisions about whether HIV-positive incarcerated people were qualified to participate.[119] But the ruling has had the effect of preventing HIV-positive incarcerated people from participating in most programs with the general population. Beyond the Eleventh Circuit, it appears that only a few other federal courts have considered the issue of whether an HIV-positive incarcerated person can be a "direct threat."[120] Notably, the court in *Henderson v. Thomas* found that the *Onishea* analysis no

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[111] *See, e.g.*, Doe v. County of Centre, 242 F.3d 437, 447 (3d Cir. 2001) (explaining the "direct threat" analysis in an ADA Title II and § 504 case); Dadian v. Village of Wilmette, 269 F.3d 831, 840 n.6 (7th Cir. 2001) (stating that whether an individual is "otherwise qualified" depends on whether he poses a threat to the safety of others that cannot be reduced by reasonable accommodation); Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 735 (9th Cir. 1999) (holding that a person who poses a direct threat or "significant risk" to others is not a qualified individual under Title II).

[112] Dadian v. Village of Wilmette, 269 F.3d 831, 840 (7th Cir. 2001) (holding that the burden of showing a direct threat due to a disability is on the party that claims there is a direct threat).

[113] See Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, MRSA, and COVID-19 in Prison," for additional information on the rights of HIV-positive incarcerated people.

[114] Onishea v. Hopper, 171 F.3d 1289, 1296–1297 (11th Cir. 1999) (reading § 504's definition of "individual with a disability" as not including a person "who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals"). The *Onishea* court relied on 29 U.S.C. § 705(20)(D), a section of the Rehabilitation Act that excludes from employment protection people who are a direct threat to others because they have a currently contagious disease or infection.

[115] Onishea v. Hopper, 171 F.3d 1289, 1292–1293 (11th Cir. 1999).

[116] Onishea v. Hopper, 171 F.3d 1289, 1293–1295 (11th Cir. 1999).

[117] Onishea v. Hopper, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that "when transmitting a disease inevitably entails death, the evidence supports a finding of 'significant risk' if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease. . . . [E]vidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk").

[118] Onishea v. Hopper, 171 F.3d 1289, 1305 (11th Cir. 1999) (Barkett, J., dissenting). A dissenting opinion is an opinion, written by a judge on the court, that disagrees with the court's decision. A dissenting opinion is not controlling law, but it may suggest arguments other courts will make in future rulings.

[119] Onishea v. Hopper, 171 F.3d 1289, 1293 (11th Cir. 1999).

[120] Onishea v. Hopper, 171 F.3d 1289, 1293 (11th Cir. 1999).

longer applies because of the effect of modern medicine in reducing the harm from HIV as well as the likelihood of transmission.[121]

Other courts have looked at specific programs to decide whether HIV-positive incarcerated people are qualified.[122] For more information on the segregation (separation) of HIV-positive incarcerated people from the general population, and other issues of special interest to HIV-positive incarcerated people, see *JLM*, Chapter 26, "Infectious Diseases: AIDS, Hepatitis, Tuberculosis, MRSA, and COVID-19 in Prisons."

4. Your Right to "Reasonable Modifications" of Prison Policy under the ADA

The ADA requires state and local entities to make "reasonable modifications" to policies, rules, and practices so that people with disabilities can participate in public programs and services.[123] A reasonable modification should allow you to take part in a program or activity, or to gain access to a facility. Reasonable modifications may be simple—for example, creating an exception to the rule forbidding incarcerated people from storing food in their cells, so a diabetic person can keep his "blood sugar at an appropriate level."[124] Other modifications are more complicated.

Whether a modification is considered reasonable depends on the specific circumstances and modification you ask for. To decide what a "reasonable modification" is, courts weigh the needs of incarcerated people with disabilities against the structural, financial, and administrative concerns of the prison. In particular, courts look at: (1) whether the modification will "fundamentally alter" a program or activity,[125] (2) the cost of the modification, and (3) the burden the modification would have on the administration of the prison.[126] Some courts also look at concerns relating to prison management and rehabilitation for incarcerated persons, such as safety.[127]

You should be prepared for the prison to make these kinds of arguments. The prison has the burden of showing that a modification would "result in a fundamental alteration in the nature of a service, program, or activity or in undue [extreme] financial and administrative burdens."[128] Even if the prison succeeds in showing that changes would fundamentally alter a program, or cause an undue financial or administrative burden, it must still "take any other action" that would "ensure that

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[121] Henderson v. Thomas, 913 F. Supp. 2d 1267, 1289–1290 (M.D. Ala. 2012) (finding HIV to not constitute a direct threat justifying segregation of HIV-positive incarcerated people at correctional facilities).

[122] Bullock v. Gomez, 929 F. Supp. 1299, 1304–1305 (C.D. Cal. 1996) (finding that the prison's reasons for excluding the incarcerated person from the conjugal visit program—transmission of tuberculosis and other strains of HIV—might not be justified, given that evidence showed low risk of transmission and that denying conjugal visits was not an effective measure to prevent the spread of tuberculosis); *see also* Doe v. Coughlin, 71 N.Y.2d 48, 61, 518 N.E.2d 536, 544, 523 N.Y.S.2d 782, 790 (1987) (reviewing specific program requirements before deciding that an HIV-positive incarcerated person was not qualified for the family reunion program because the program required applicants to be free of communicable diseases).

[123] Americans with Disabilities Act, 42 U.S.C. § 12131(2).

[124] This example was taken from the Disability Rights Section of the Department of Justice Civil Rights Division. *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement*, U.S. DEPT. OF JUSTICE (2006), *available at* http://www.ada.gov/q%26a_law.htm (last visited Oct. 13, 2023). Contact information for the DOJ can be found in Question 25.

[125] 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164 (2023).

[126] 28 C.F.R. §§ 35.150(a)(3), 35.164 (2023).

[127] *See, e.g.*, Randolph v. Rodgers, 170 F.3d 850, 859 (8th Cir. 1999) (noting that the prison could present evidence that providing an interpreter for a deaf incarcerated person at disciplinary hearings created safety and security concerns); Love v. Westville Corr. Ctr., 103 F.3d 558, 561 (7th Cir. 1996) (noting that the prison could justify its refusal to make reasonable accommodations because the overall demands of running a prison made it impossible to make such accommodations).

[128] *See* 28 C.F.R. § 35.130(b)(7) (2023) (defining the general application of fundamental alteration defense); 28 C.F.R. § 35.150(a)(3) (2023) (defining the fundamental alteration and undue burden defenses for existing facilities); 28 C.F.R. § 35.164 (2023) (defining the fundamental alteration and undue burden defense to providing effective communication). Furthermore, the "decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. §§ 35.150(a)(3), 35.164 (2023).

individuals with disabilities receive the benefits or services provided" by the prison.[129] This means they are supposed to come up with other ways for you to get the benefits offered. The following Subsections describe the fundamental alteration defense, the undue burden defense, and the "penological interests" (relating to prison management or incarcerated person rehabilitation) defense to incarcerated people's ADA and Section 504 claims.

(a) Modifications Are Not Reasonable if They Result in a Fundamental Alteration to the Prison's Programs, Services, or Activities

A prison does not have to make modifications to a service, program, or activity if doing so would "fundamentally alter the nature of the service, program, or activity."[130] A fundamental alteration has to cause something essential to be lost. This allows prisons to balance the rights of incarcerated people with disabilities against the integrity of its services, programs, and activities.[131] If you are seeking a change that would make it difficult for the prison to provide the particular service, program, or activity to other incarcerated people, this could be considered a fundamental alteration that the prison does not have to provide.[132]

Courts will likely consider the circumstances surrounding a modification when determining if it is a fundamental alteration,[133] and will expect the prison to provide support for their claim that a modification is a fundamental alteration.[134] Examples of modifications likely not to be considered fundamental alterations include a shower chair, a non-slip shower floor, and the installation of shower handrails.[135] The determination of whether a modification is a fundamental one is dependent on the facts of a given case, and courts should look closely at the specific circumstances surrounding your situation.[136]

(b) Modifications Are Not Reasonable if They Cause Undue Financial or Administrative Burden

Prisons also do not have to make modifications that would result in "undue financial and administrative burdens."[137] For example, in *Onishea v. Hopper*, the court found that hiring additional guards to prevent high-risk behavior (so that HIV-positive incarcerated people could participate in

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[129] 28 C.F.R. §§ 35.150(a)(3), 35.164 (2023).

[130] 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164 (2023).

[131] *See* Galusha v. N.Y. State Dept. of Env't Conservation, 27 F. Supp. 2d 117, 123 (N.D.N.Y. 1998) (noting that the Supreme Court struck this balance in Alexander v. Choate, 469 U.S. 287, 300, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661, 671 (1985)).

[132] *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604, 119 S. Ct. 2176, 2189, 144 L. Ed. 2d 540, 560 (1999) ("Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."); *see also* Raines v. Florida, 983 F. Supp 1362, 1372 (N.D. Fla. 1997) (rejecting the prison's defense that allowing incarcerated people with disabilities into the work portion of the Incentive Gain Time program would fundamentally alter the program's incentives).

[133] *See, e.g.*, Bircoll v. Miami-Dade County, 480 F.3d 1072, 1087–1088 (11th Cir. 2007) (finding that waiting for an oral interpreter after arresting deaf person was not a reasonable modification, given the demanding circumstances of such an arrest).

[134] *See, e.g.*, Frederick L. v. Dept. of Pub. Welfare of Pa., 422 F.3d 151, 157–159 (3rd Cir. 2005) (discussing the defendant's obligation to raise fundamental-alteration arguments as affirmative defenses).

[135] *See, e.g.*, Kaufman v. Carter, 952 F. Supp. 520, 532 (W.D. Mich. 1996) (noting the insufficiency of shower and toilet accommodations for wheelchair users).

[136] Norfleet v. Walker, No. 09-cv-347-JPG-PMF, 2011 U.S. Dist. LEXIS 29817, at *10 (S.D. Ill. Mar. 22, 2011) (*unpublished*) ("[The determination of whether a modification is a fundamental alteration] is both fact-intensive and context-specific."); *see, e.g.*, Kaufman v. Carter 952 F. Supp. 520, 523–524 (W.D. Mich. 1996) (repeating in great detail the plaintiff's complaints regarding the shower and toilet specifications).

[137] 28 C.F.R. §§ 35.150(a)(3), 35.164 (2023).

programs with the general population) would not be a "reasonable accommodation," because it would be too expensive, causing undue financial burden.[138]

The DOJ seems to believe that the undue burden test is hard for a prison to pass—that it would apply only in "the most unusual cases."[139] While some courts (as in *Onishea* and *Spurlock*) may allow defendant prisons to pass the test in situations the DOJ would not consider unusual, others are requiring more than "administrative or fiscal convenience" to segregate services under Title II.[140] For example, in *Pierce v. County of Orange*, the court found no evidence that allowing incarcerated people access to an adjacent "Inmate Programming Building" would impose undue financial or administrative burdens.[141] As with the "fundamental alteration" defense, the determination of whether a modification will cause undue financial or administrative burden is dependent on the facts of a given case.[142]

(c) Modifications Are Not Reasonable If They Impact Overall Institutional Concerns (Penological Interests)

The ADA regulations only mention fundamental alterations and undue burdens as the arguments prisons can use to avoid making modifications for disabilities. However, courts have permitted prisons a third argument to avoid making those modifications: "overall institutional requirements," such as "[s]ecurity concerns, safety concerns, and administrative" needs.[143] In considering these institutional requirements, some courts strongly presume that prison policies are acceptable.[144] (This is called "deference to prison management.") In jurisdictions that use this approach, you will have to overcome this presumption.[145]

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[138] Onishea v. Hopper, 171 F.3d 1289, 1303–1304 (11th Cir. 1999); *see also, e.g.*, Spurlock v. Simmons, 88 F. Supp. 2d 1189, 1196 (D. Kan. 2000) (holding that a deaf incarcerated person had "meaningful access" to a Telecommunications Device for the Deaf when he was allowed to use it at least twice a week, and more frequently if he had a legitimate reason); *see also* Paulone v. City of Frederick, 787 F. Supp. 2d 360, 397 n.43 (D. Md. 2011) (expressing skepticism that it would be an undue financial or administrative burden to provide an interpreter, when the State provided interpreters as a matter of policy).

[139] 28 C.F.R. § Pt. 35, App. B (2023) (discussing 28 C.F.R. § 35.150 (2023) and noting that "Congress intended the 'undue burden' standard in title II to be significantly higher than the 'readily achievable' standard in title III" and that "the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases"); *see also Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement*, Question 22, U.S. DEPT. OF JUSTICE (2003), *available at* http://www.ada.gov/q%26a_law.htm (last visited Oct. 15, 2023) (noting that new jails and prisons "must be made fully accessible to, and usable by, individuals with disabilities"; that there is "no undue burden limitation for new construction"; and that "if an agency alters an existing facility for any reason—including reasons unrelated to accessibility—the altered areas must be made accessible to individuals with disabilities"). Contact information for the DOJ can be found at Question 25.

[140] *See, e.g.*, Greist v. Norristown State Hosp., Civil Action No. 96-CV-8495, 1997 U.S. Dist. LEXIS 16320, at *11 (E.D. Penn. Oct. 16, 1997) (*unpublished*); *see also* Blunt v. Lower Merion School Dist., 767 F.3d 247, 274 (3rd Cir. 2014) (noting that "mere administrative or fiscal convenience does not constitute a sufficient justification for providing separate or different services to a handicapped child").

[141] Pierce v. County of Orange, 761 F. Supp. 2d 915, 936 (C.D. Cal. 2011).

[142] Norfleet v. Walker, No. 09-cv-347-JPG-PMF, 2011 U.S. Dist. LEXIS 29817, at *10 (S.D. Ill. Mar. 22, 2011) (*unpublished*) ("[The determination of whether a modification would cause undue financial or administrative burden] is both fact-intensive and context-specific").

[143] Love v. Westville Corr. Ctr., 103 F.3d 558, 561 (7th Cir. 1996) (noting that the prison could have attempted to justify its refusal to make reasonable accommodations because of the overall needs of running a prison); Miller v. King, 384 F.3d 1248, 1266 (11th Cir. 2004) ("courts must be mindful of the necessary balance between the ADA's worthy goal of integration and a prison's unique need for security, safety, and other penological concerns"), *vacated and superseded on other grounds*, Miller v. King, 449 F.3d 1149 (11th Cir. 2006).

[144] Wilkinson v. Austin, 545 U.S. 209, 228, 125 S. Ct. 2384, 2397, 162 L. Ed. 2d 174, 193 (2005) (finding that "courts must give substantial deference to prison management decisions"); *see also* Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994) (noting that separation of powers, especially with regard to state penal systems, favors judicial deference to prison authorities).

[145] Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001) (noting that the incarcerated person has the burden of refuting the defense that there were legitimate penological interests behind prison action); *see also* Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994).

Not all courts that recognize the defense of "overall institutional concerns" will show deference to prison officials. For example, in *Armstrong v. Schwarzenegger*, defendants argued that they had legitimate "penological" (relating to prison management or criminal rehabilitation) reasons to house a class of incarcerated people in county jails rather than state prisons, and that they were entitled to deference. The court, however, found that prison management "demand[ed] deference to which they are not entitled" and did not find any penological reasons for such housing.[146] Additionally, some courts require more than penological interests alone for a modification to qualify as unreasonable. For example, in *Henderson v. Thomas*, the court stated that prior cases did not "require this court to treat penological interests as a trump on the plaintiffs' [ADA] statutory rights," before finding that, while the prison had a legitimate penological interest in diminishing the spread of HIV to other incarcerated people, they could prevent HIV transmissions while still allowing reasonable modifications for the plaintiff.[147] Because of the variety of approaches used by courts, as well as the fact-specific nature of the courts' determinations, you should see how courts have ruled in your jurisdiction when making a claim.

(d) The *Turner* Test in ADA and Section 504 Claims for Incarcerated People with Diabetes

Circuit courts have used the *Turner v. Safley*[148] test in ADA and Section 504 cases to decide when a prison policy can legally discriminate against incarcerated people with disabilities. Under this test, prison policies are acceptable if they are "reasonably related to legitimate penological interests," meaning that the policies are related to a legitimate prison concern or goal.[149] Some courts have used this test to decide what is a reasonable modification under the ADA for incarcerated people with disabilities.[150]

The *Turner* test is usually used to decide incarcerated people's *constitutional* claims, not *statutory* claims like the ADA and Section 504. Some experts believe the *Turner* test is inappropriate in ADA cases.[151] It is better for incarcerated people when courts do *not* use *Turner*, because the ADA and

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[146] Armstrong v. Schwarzenegger, 622 F.3d 1058, 1069–1070 (9th Cir. 2010) (finding that defendant's practice of placing certain classes of incarcerated people in county jails as opposed to state jails did not have a legitimate penological interest).

[147] Henderson v. Thomas, 913 F. Supp. 2d 1267, 1313–1314 (M.D. Ala. 2012).

[148] Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987) (establishing a reasonableness test for courts to apply to incarcerated people's constitutional challenges to prison regulations).

[149] Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79–80 (1987). In *Turner*, the Supreme Court identified four factors used to determine the "reasonableness" of a challenged prison regulation: (1) whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether there are other ways an incarcerated person could exercise the right at issue; (3) "the impact [that] accommodation . . . will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether there are "ready alternatives" to the regulation. The *Turner* test generally is used when incarcerated people claim that their constitutional rights have been violated. For further discussion of the *Turner* test, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

[150] *See*, *e.g.*, Thompson v. Davis, 295 F.3d 890, 898 n.4 (9th Cir. 2002) (noting that a prison might be able to give legitimate penological justifications for considering certain disabilities in parole decisions, particularly when the disability is a history of substance abuse); Randolph v. Rodgers, 170 F.3d 850, 859 (8th Cir. 1999) (noting that a prison should be allowed to present evidence that providing an interpreter for a deaf incarcerated person at disciplinary hearings created security concerns); Onishea v. Hopper, 171 F.3d 1289, 1300 (11th Cir. 1999) (allowing the use of a test almost identical to the *Turner* test, despite explicitly stating that the *Turner* test "does not, by its terms, apply to" the ADA); Crawford v. Ind. Dept. of Corr., 115 F.3d 481, 487 (7th Cir. 1997) (noting that what is "reasonable" or an "undue" burden is different in the prison context and that security concerns are relevant to whether accommodations for incarcerated people with disabilities are "feasible"); Gates v. Rowland, 39 F.3d 1439, 1447–1448 (9th Cir. 1994) (applying the *Turner* test to uphold a policy of excluding HIV-positive incarcerated people from food service assignments); Kaufman v. Carter, 952 F. Supp. 520, 532 (W.D. Mich. 1996) (finding it sensible that incarcerated people's ADA rights are limited by "legitimate penological interests").

[151] *See* Christopher J. Burke, Note, *Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners' Statutory Claims Under the Americans with Disabilities Act*, 98 MICH. L. REV. 482, 495–498 (1999) (arguing that

Section 504 require defendants to make any reasonable accommodations for incarcerated people's disabilities. Also, reasonable accommodations or modifications under the ADA often include expensive physical renovations or other expenditures.[152] In comparison, the *Turner v. Safley* reasonableness standard prescribes only "*de minimis* cost" (minor cost) solutions. (So, a prison would have to make more accommodations for you under the ADA and Section 504, and fewer and cheaper accommodations under *Turner*.) However, some courts have held that the ADA/Section 504 standard must be interpreted consistently with the *Turner* standard,[153] or at least may be influenced by the *Turner* standard.[154]

Gates v. Rowland is an early case in which a court applied the *Turner* test to an incarcerated person's Section 504 claim. In *Gates*, HIV-positive incarcerated people sued under Section 504 to be allowed to work as food preparers and servers in a prison food service program. The prison argued that it was justified in excluding them based solely on their HIV status because other incarcerated people "frequently have irrational suspicions or phobias" about people with HIV, and these suspicions or phobias cannot be reversed by educating incarcerated people about HIV.[155] Prison officials claimed that allowing HIV-positive incarcerated people to serve food could lead to violence against HIV-positive food workers and the prison staff.[156]

The *Gates* court concluded that the *Turner* test was the correct test for deciding incarcerated people's rights under Section 504, even though the *Turner* test is normally used only for incarcerated people's constitutional claims.[157] Under the *Turner* test, the court upheld the policy discriminating against HIV-positive incarcerated people, stating that the prison had a "reasonable basis for [the] restriction based on legitimate penological concerns."[158]

Courts following the *Gates* approach do not always uphold challenged discriminatory conduct.[159] In your complaint, be sure to provide the court with appropriate language from the ADA, Section 504, and the regulations that cover those laws. Generally, the ADA and Section 504 (written by Congress) and the ADA regulations (written by the DOJ) protect your rights as an incarcerated person with disabilities more than many courts recognize. You should emphasize how the laws and regulations plainly protect your rights.[160]

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(1) *Turner*'s rationale regarding the restrictions on constitutional rights are not applicable to statutory rights, because statutes represent congressional determinations of policy and resource allocation; (2) statutory rights allow Congress to provide guidance to prison administrators and allow flexibility and modification if the statute is unworkable; and (3) legislation like the ADA provides much detail to courts and prison administrators, whereas constitutional rights necessarily are dependent on judicial determinations).

[152] *But see* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 607, 119 S. Ct. 2176, 2190, 144 L. Ed. 2d 540, 562 (1999) (holding that a state's ADA obligations are determined by "taking into account the resources available to the State").

[153] Gates v. Rowland, 39 F.3d 1439, 1446–1447 (9th Cir. 1994) (holding the *Turner* standard applicable under the ADA). *Contra* (decided exactly the opposite in) Amos v. Md. Dept. of Public Safety & Corr. Servs., 178 F.3d 212, 220 (4th Cir. 1999) (rejecting application of *Turner* as inconsistent with *Yeskey*), *dismissed as settled*, Amos v. Md. Dept. of Public Safety & Corr. Servs., 205 F.3d 687 (4th Cir. 2000).

[154] Onishea v. Hopper, 171 F.3d 1289, 1300–1301 (11th Cir. 1999) (holding that the *Turner* standard can be "properly considered" when applying the ADA).

[155] Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994).

[156] Gates v. Rowland, 39 F.3d 1439, 1447–1448 (9th Cir. 1994).

[157] Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994).

[158] Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994).

[159] *See, e.g.*, Chisolm v. McManimon, 275 F.3d 315, 327 (3d Cir. 2001) (refusing to decide whether the *Turner* test is appropriate in ADA and Section 504 claims, but noting that the prison's mention of "security" concerns, without evidence that these security concerns were real, would not be enough under the *Turner* test even if the test were used); Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001) (finding that the state failed to meet its burden under the *Turner* test by not presenting "*any* justification, rational or not," for its parole hearing policies that discriminated against incarcerated people and parolees with hearing and vision impairments, and learning and developmental disabilities).

[160] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843–844, 104 S. Ct. 2778, 2782, 81 L. Ed.

(e) If Your Claim Involves Architectural Barriers at the Prison

If your complaint is about physical access within your prison, keep in mind that the ADA implementing regulations do not allow the undue burden defense for facilities built or significantly altered after January 26, 1992.[161] For example, if you are housed in a cellblock built or significantly altered any time after 1992, and you cannot use your wheelchair to get into the bathroom because the doorway is too narrow, the prison cannot say, "It would cost too much to enlarge the doorway." If you are in (or need access to) a unit, cellblock, or compound significantly altered after 1992—even if the rest of the prison was built before 1992—and your complaint is about your ability to physically access those parts of the facility, your complaint should (1) cite to the regulations, and (2) state that significant changes have been made since 1992.

If your disability restricts your movement or requires that you use a cane, wheelchair, or other device, many courts have said prisons must make reasonable accommodations for your disability. Some courts have found that the ADA does not create any right for an incarcerated person to be housed at a specific prison.[162] But at least one court has ruled that if there is a specific unit that treats incarcerated people with specific disabilities, it is a violation of the ADA and Section 504 to (1) transfer eligible incarcerated people out of, or (2) refuse to transfer eligible incarcerated people into that unit unless the prison can provide the treatment at other facilities.[163] This applies even if the prison wants to do so for disciplinary, safety, medical, or mental health reasons.[164]

Even if no special unit exists for incarcerated people with disabilities, prisons and jails must make reasonable accommodations for incarcerated people with mobility impairments. Courts have found that using bathroom facilities is a basic activity, and that prisons violate the ADA and Section 504 if they do not provide incarcerated people with disabilities accommodations like shower chairs, handrails, guard rails, and shower hoses if needed.[165] Any physical barrier that restricts access or

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2d 694, 703 (1984) (holding that when Congress gives authority to an agency to interpret a law through regulations, the regulations have "controlling weight unless they are arbitrary, capricious," or are clearly contrary to the law as written by Congress).

[161] 28 C.F.R. § 35.151(a)–(b) (2023) ("Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.").

[162] Garrett v. Angelone, 940 F. Supp. 933, 942 (W.D. Va. 1996), *aff'd*, Garrett v. Angelone, 107 F.3d 865 (4th Cir. 1997) (finding that incarcerated people "have no constitutional right to be housed in any particular prison or housing unit").

[163] Clarkson v. Coughlin, 898 F. Supp. 1019, 1050–1051 (S.D.N.Y. 1995) (finding that transferring incarcerated people from facilities with appropriate accommodations, even for "disciplinary, safety, and/or medical reasons," violates both the ADA and § 504).

[164] Clarkson v. Coughlin, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995).

[165] *See, e.g.*, United States v. Georgia, 546 U.S. 151, 157, 126 S. Ct. 877, 881, 163 L. Ed. 2d 650, 658 (2006) ("[I]t is quite plausible that the alleged deliberate refusal of prison officials to accommodate Goodman's disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs constituted 'exclu[sion] from participation in or . . . den[ial of] the benefits of' the prison's 'services, programs, or activities.'"); Pierce v. County of Orange, 526 F.3d 1190, 1196 (9th Cir. 2008) (holding that "because of physical barriers that deny disabled inmates access to certain prison facilities (bathrooms, showers, exercise and other common areas), and because of disparate programs and services offered to disabled versus non-disabled inmates, the County is in violation of the ADA"); Kiman v. N.H. Dept. of Corr., 451 F.3d 274, 286–288 (1st Cir. 2006) (holding that denial of access to a shower chair, as well as other necessary accommodations, to an incarcerated person with disabilities raised an issue of material fact regarding defendant's failure to provide the incarcerated person with reasonable accommodations as required by the ADA); Grant v. Schuman, No. 96-3760, 1998 U.S. App. LEXIS 16852, at *4, *7–8 (7th Cir. July 16, 1998) (*unpublished*) (allowing an incarcerated person with paralysis and nerve damage to proceed with an ADA claim regarding lack of handrails in toilet and shower areas); Cotton v. Sheahan, No. 02 C 0824, 2002 U.S. Dist. LEXIS 20539, at *9 (N.D. Ill. Oct. 23, 2002) (*unpublished*) (allowing incarcerated person who used a wheelchair to bring the claim that he was denied access to a shower); Schmidt v. Odell, 64 F. Supp. 2d 1014, 1032–1033 (D. Kan. 1999) (noting a possible ADA violation even though the incarcerated person was able to use most of the services, because doing so required exceptional and painful exertion against his doctor's orders); Cooper v. Weltner, No. 97-3105-JTM, 1999 U.S. Dist. LEXIS 17292, at *19–

creates risks of injury to incarcerated people with disabilities also violates the ADA.[166] In your complaint, make sure to describe any barriers carefully and in detail—do not just state they exist.[167]

(f) Provision of Auxiliary Aids and Services

The ADA and Section 504 also require prisons and jails to provide incarcerated people with disabilities auxiliary (extra) aids or services to help them participate in the facility's programs and activities. As with modifications, the prison or jail only has to provide these aids or services if they are reasonable. Examples of aids and services for hearing-impaired people include:

> (A) qualified interpreters or other effective methods of making aurally [able to be heard] delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; and (D) other similar services and actions.[168]

Examples of aids and services for people with visual impairments include: "[q]ualified readers; taped texts; audio recordings; Brailled materials . . . ; [and] large print materials."[169] Other aids and services might include providing an incarcerated person who is an amputee with a wheelchair, shower seat, and similar assistive devices.[170]

If you meet all of the eligibility requirements for a program, but cannot participate without an aid or service like the ones mentioned above, then the ADA requires the prison to provide any aids and services that will allow you to participate. However, as with modifications, a prison may justify not providing aids and services by saying the request is not reasonable, and then use the undue burden defense, or even the *Turner* test, to justify its action or lack of action.

Incarcerated people with hearing impairments have been particularly successful with ADA and Section 504 claims that argue prisons discriminated by failing to provide auxiliary aids and services to help them communicate. Courts have found that prisons violated the ADA and Section 504 by failing to provide qualified interpreters during reception and classification, counseling sessions, administrative and disciplinary hearings, and medical treatment and diagnosis.[171] Some courts also

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20 (D. Kan. Oct. 26, 1999) (*unpublished*) (allowing an incarcerated person who used a wheelchair to bring an ADA claim that the prison discriminated against him by failing to provide assistive devices for the shower); Kaufman v. Carter, 952 F. Supp. 520, 523, 532–533 (W.D. Mich. 1996) (allowing a bilateral amputee incarcerated person to go forward with his claim that the jail violated the ADA by failing to provide an accessible shower and toilet); Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 U.S. Dist. LEXIS 21063, at *11 (M.D. Ala. Apr. 27, 1993) (*unpublished*) (holding that the ADA required the city jail to make its showers accessible to and usable by incarcerated people with disabilities).

166 *See, e.g.*, Montez v. Romer, 32 F. Supp. 2d 1235, 1237, 1243 (D. Colo. 1999) (allowing incarcerated people to go forward with an ADA and § 504 suit claiming that physical barriers in the prison created safety risks).

167 *See, e.g.*, Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987) ("[C]omplaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning."); Carrasquillo v. City of New York, 324 F. Supp. 2d 428, 443 (S.D.N.Y. 2004) (dismissing the suit because the incarcerated person's claim did not allege that he was prevented from accessing the law library and infirmary due to his disability).

168 ADA Amendments Act of 2008, Pub. L. No. 110–325, § 4(1)(A)–(D), 122 Stat. 3553, 3556 (2008).

169 28 C.F.R. § 35.104(2) (2023).

170 *See* Schmidt v. Odell, 64 F. Supp. 2d. 1014, 1031–1033 (D. Kan. 1999) (allowing a double amputee incarcerated person to go forward with his ADA and Section 504 suit against a county jail that delayed in providing him with a shower chair and refused to transfer him to a jail that had enough space for him to use a wheelchair).

171 Clarkson v. Coughlin, 898 F. Supp. 1019, 1034–1035 (S.D.N.Y. 1995) (holding that not providing incarcerated people with hearing-impaired with qualified interpreters and other assistive devices for numerous programs, services, and activities violates the ADA and § 504); Bonner v. Ariz. Dept. of Corr., 714 F. Supp. 420, 423 (D. Ariz. 1989) (holding that not providing a deaf, mute, and vision-impaired incarcerated person with a qualified interpreter for prison counseling, medical treatment, and disciplinary and administrative hearings violates § 504 unless the prison can prove that the incarcerated person could communicate effectively without a

have found that a lack of interpreters in such settings violates incarcerated people's constitutional due process, Eighth Amendment, and privacy rights.[172] The term "qualified interpreter" is defined as "an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."[173] This means that a prison guard who knows only basic sign language is not a qualified interpreter, because he is neither impartial nor able to interpret effectively. Also, someone who knows Signed English is not a qualified interpreter for a hearing-impaired incarcerated person who communicates in American Sign Language, and vice versa.[174]

Access to interpreters is not the only service that hearing-impaired incarcerated people have demanded successfully under the ADA and Section 504. The ADA also requires that public entities (1) provide persons with disabilities the opportunity to request the auxiliary aids and services of their choice, and (2) give "primary consideration to the requests of individuals with disabilities."[175] The regulations require prisons to notify persons with disabilities of their ADA protections,[176] and to have a grievance process for people who believe their prison has failed to make programs and services accessible to disabled individuals.[177] For example, one court held that a prison violated the ADA and Section 504 by failing to provide various adaptations for the deaf, including TDDs, closed-caption decoders for televisions, and fire alarms that alert people visually.[178] Another court has held that failure to provide TDD for the deaf fiancée of an incarcerated person may be a violation of the ADA.[179]

5. What are "Services, Programs, or Activities?"

Under both the ADA and Section 504, prison authorities cannot exclude you from participating in services, programs, or activities if reasonable modifications would allow you to participate. Almost everything you do in prison—from your work assignment, to your use of the recreation yard, to your use of the library to your visitation privileges—is considered a program or service offered by the

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qualified interpreter); *see also* Duffy v. Riveland, 98 F.3d 447, 453–456 (9th Cir. 1996) (allowing a deaf incarcerated person to go forward with his claim that the prison failed to provide him with a qualified interpreter for classification and disciplinary hearings, in violation of the ADA and § 504).

[172] Clarkson v. Coughlin, 898 F. Supp. 1019, 1034, 1042–1043 (S.D.N.Y. 1995) (holding that, by failing to provide qualified interpreters or other assistive devices necessary for medical and mental health treatment, the Department of Corrections and prison officials violated deaf incarcerated people's 14th Amendment substantive due process right and constitutional right to privacy, and the 8th Amendment's ban on cruel and unusual punishment).

[173] 28 C.F.R. § 35.104 (2023).

[174] Clarkson v. Coughlin, 898 F. Supp. 1019, 1026–1027 (S.D.N.Y. 1995) (indicating that an interpreter who uses Signed English is not qualified to interpret for an incarcerated person who uses American Sign Language).

[175] 28 C.F.R. § 35.160(b)(1)–(2) (2023); *see* Disability Rights Section, *Americans with Disabilities Act: Title II Technical Assistance Manual, II-1.2000*, U.S. DEPT. OF JUSTICE, *available at* http://www.ada.gov/taman2.html (last visited Oct. 14, 2023) (indicating that the individual's preferences should be considered when deciding what aids to provide for him).

[176] 28 C.F.R. § 35.106 (2023) (describing the requirement that public entities notify people with disabilities of their rights under the ADA); *see also* 28 C.F.R. § 35.163(a) (2023) ("A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.").

[177] 28 C.F.R. § 35.107(b) (2023) ("A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.").

[178] Clarkson v. Coughlin, 898 F. Supp. 1019, 1047 (S.D.N.Y. 1995). *But see* Spurlock v. Simmons, 88 F. Supp. 2d 1189, 1196 (D. Kan. 2000) (holding that providing a deaf incarcerated person with only limited telephone access, while permitting other incarcerated people unlimited access, did not violate the ADA because the deaf incarcerated person's request was unreasonable). *Clarkson* also held that deaf female incarcerated people were discriminated against on the basis of their sex because New York had a special prison unit that could accommodate many of the needs of deaf and hearing-impaired male incarcerated people, but did not have a similar unit for female incarcerated people. Clarkson v. Coughlin, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995).

[179] Niece v. Fitzner, 922 F. Supp. 1208, 1217–1219 (E.D. Mich. 1995) (finding a possible ADA violation in prison officials' refusal to provide accommodations for an incarcerated person to communicate with his deaf fiancée).

prison.[180] Incarcerated people with disabilities have argued that prisons and jails must accommodate their needs in the use of the following programs: boot camps,[181] conjugal visitation programs,[182] libraries and law libraries,[183] educational programs,[184] vocational training,[185] job opportunities,[186] the commissary and dispensary,[187] transition programs,[188] dining halls,[189] visitations,[190] telephone calls,[191] church services,[192] eligibility for trustee status,[193] substance abuse classes,[194] access to

[180] *See* Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (stating that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners").

[181] *See* Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (noting that the prison's motivational boot camp for first-time offenders is a program).

[182] *See* Bullock v. Gomez, 929 F. Supp. 1299, 1303–1304 (C.D. Cal. 1996) (noting that the incarcerated person was able to show that he was excluded from the conjugal visit program, although the issue of whether he was "otherwise qualified" was not yet resolved).

[183] *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 558–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person's ADA rights had been violated when he was denied access to prison libraries).

[184] *See* Crawford v. Ind. Dept. of Corr., 115 F.3d 481, 483 (7th Cir. 1997) ("[T]here is no doubt that an educational program is a program."). While *Crawford* recognizes educational programs as programs, some courts have held that the ADA does not require a prison to implement a specific type of rehabilitation or education program that is not already available. Garrett v. Angelone, 940 F. Supp. 933, 942 (W.D. Va. 1996), *aff'd*, Garrett v. Angelone, 107 F.3d 865 (4th Cir. 1997).

[185] *See* Montez v. Romer, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (noting that incarcerated people argue that they were unable to participate in vocational training because the prison did not accommodate their disabilities).

[186] *See* Montez v. Romer, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (noting that incarcerated people argue that they were excluded from employment programs because of their disabilities); Love v. Westville Corr. Ctr., 103 F.3d 558, 560–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person's rights under the ADA had been violated when he was denied access to "work programs").

[187] *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 560–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person's ADA rights had been violated when he was denied access to the prison commissary); Kiman v. N.H. Dept. of Corr., 451 F.3d 274, 284 (1st Cir. 2006) (finding that access to medication is one of the "services, programs, or activities" covered by the ADA).

[188] *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 559–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person's rights under the ADA were violated when he was denied access to transition programs).

[189] *See* Crawford v. Ind. Dept. of Corr., 115 F.3d 481, 483 (7th Cir. 1997) (noting that use of the dining hall is an activity under the ADA); Rainey v. County of Delaware, CIV.A. No.00-548, 2000 U.S. Dist. LEXIS 10700, at *4–5, *10, *14 (E.D. Pa. Aug. 1, 2000) (*unpublished*) (permitting the claim that a disabled incarcerated person was given insufficient time to travel to the dining hall, thereby depriving him of food).

[190] *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 558–561 (7th Cir. 1996) (upholding a decision that a quadriplegic incarcerated person's ADA rights were violated when he was denied access to "visitation facilities that were open to the general inmate population," and allowing him to bring a claim that being housed in an infirmary unit cut off his access to many prison facilities, including visitation rooms).

[191] Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–1033 (S.D.N.Y. 1995) (granting summary judgment under the ADA where deaf incarcerated people were denied amplified headsets or telephone communication devices for the deaf).

[192] *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 558–561 (7th Cir. 1996) (upholding a decision that a quadriplegic incarcerated person's ADA rights were violated when he was denied access to church services).

[193] *See* Dean v. Knowles, 912 F. Supp. 519, 522 (S.D. Fla. 1996) (allowing an asymptomatic HIV-positive incarcerated person to bring a discrimination suit against prison officials who denied him trustee status).

[194] *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 558–561 (7th Cir. 1996) (upholding a decision that a quadriplegic incarcerated person's ADA rights were violated when he was denied access to substance abuse programs).

reading materials and television,[195] college classes,[196] and access to medical care.[197] At least one court has determined that granting parole is an "activity," and thus the actions of the parole board must comply with the ADA.[198] Even disciplinary measures like shackling have been challenged as violating the ADA and the Constitution if, although they apply to all incarcerated people, they have a disparate (uniquely unfair) impact on incarcerated people with disabilities.[199] Prison disciplinary hearings are also subject to the ADA.[200]

Because programs and services vary from prison to prison, the ADA and Section 504 define programs and activities very broadly. Courts rarely dismiss suits because the activity in question did not qualify as a program.[201] If you have a disability, are qualified for the activity or program (even if it is not listed above), and the prison refuses to allow you to participate, you may have a claim under the ADA and Section 504.

6. State Accessibility Laws and Regulations

Many states have accessibility and anti-disability discrimination statutes similar to the ADA. If you live in a state with a law that provides such protection, you should sue under state law as well. Most states require public and government facilities to be physically accessible to people with disabilities.[202] Some states have laws that clearly require state services or programs to provide

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[195] *See* Walker v. Snyder, 213 F.3d 344, 345 (7th Cir. 2000) (stating that the district court had found an ADA violation in the prison's failure to provide books on tape); Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–1033 (S.D.N.Y. 1995) (finding ADA violation where deaf in incarcerated people were denied a closed-caption decoder for televisions).

[196] *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 559–561 (7th Cir. 1996) (upholding the decision that a quadriplegic incarcerated person's ADA rights were violated when he was denied access to prison educational programs).

[197] Most courts have held that the ADA does not provide a cause of action for inappropriate medical care. This is different from inadequate availability of medical care. If there is no medical care available to you, you may have an ADA claim. But, if the care you received was inappropriate, as stated, most courts will hold you do not have an ADA claim. *See, e.g.*, Moore v. Prison Health Servs., Inc., 24 F. Supp. 2d 1164, 1168 (D. Kan. 1998) (holding that a claim of inadequate medical care is not appropriate under the ADA), *aff'd,* Moore v. Prison Health Servs., 201 F.3d 448 (10th Cir. 1999). However, courts have upheld claims alleging discriminatory *access* to medical care because of the incarcerated person's disability. *See, e.g.*, McNally v. Prison Health Servs., 46 F. Supp. 2d 49, 58–59 (D. Me. 1999), *reh'g denied*, McNally v. Prison Health Servs., 52 F. Supp. 2d 147, 148 (D. Me. 1999) (allowing an incarcerated person to go forward with his claim that the prison violated the ADA by refusing to administer HIV medication because of his HIV status). The 8th Amendment may provide an alternative cause of action for inappropriate or inadequate medical care. *See, e.g.*, Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–1033 (S.D.N.Y. 1995) (holding that failure to provide sign language interpreters prevented deaf incarcerated people from receiving adequate medical care, in violation of their due process and 8th Amendment rights).

[198] Thompson v. Davis, 295 F.3d 890, 898–899 (9th Cir. 2002) (holding that parole proceedings are subject to the ADA's requirements).

[199] Armstrong v. Davis, 275 F.3d 849, 859 (9th Cir. 2001) (affirming the district court's injunction ordering a prison to stop shackling, during parole hearings, incarcerated people with hearing impairments or who used sign language).

[200] Duffy v. Riveland, 98 F.3d 447, 455 (9th Cir. 1996) (holding that prison disciplinary hearings are subject to the ADA's requirements).

[201] *But see* Aswegan v. Bruhl, 113 F.3d 109, 110 (8th Cir. 1997) (holding that cable television is not a "service, program or activity" within the meaning of the ADA).

[202] *See* ALA. CODE §§ 21-4-1–4 (2011); ALASKA STAT. § 35.10.015 (2007); ARIZ. REV. STAT. ANN. §§ 41-1492.0–1492.05. (2008); CAL. CIV. CODE § 54 (West 2007); CONN. GEN. STAT. ANN. § 46A-7 (2018); DEL. CODE ANN. tit. 16 § 9502
(WEST 2018); FLA. STAT. ANN. § 255.21 (West 2017), §§ 553.501–553.513 (West 2013); GA. CODE ANN. §§ 30-3-2–5 (2011); HAW. REV. STAT. ANN. § 103-50 (2008); KAN. STAT. ANN. §§ 58-1303–1304 (West 2008); KY. REV. STAT. ANN. § 198B.260 (2007); LA. REV. STAT. ANN. §§ 40:1731–1736 (2018); ME. REV. STAT. ANN. tit. 5, § 4591 (2013); MASS. GEN. LAWS ANN. CH. 22, § 13A (WEST 2019); MO. ANN. STAT. § 8.620 (West 2000); MONT. CODE ANN. § 50-60-201 (West 2009); N.J. STAT. ANN. § 52:32-4 (West 2010); N.M. STAT. ANN. § 28-7-3 (West 2011); N.Y. PUB. BLDGS. § 51 (2007); N.C. GEN. STAT. § 168-2 (West 2007); N.D. CENT. CODE ANN. § 48-01.2-24 (West 2008); OHIO. REV. CODE. ANN. § 3781.111 (West 2018); OKLA. STAT. tit. 61, § 11 (2008); OR. REV. STAT. ANN. §§ 447.210–280 (West 2011); PA.

modifications or accommodations for people with disabilities.[203] When researching state laws to see if they apply to you—if they cover the type of discrimination you are encountering—be sure to (1) read the statutory language carefully, and (2) review cases interpreting the statute.[204] Some state laws have broader definitions of "disability" than the ADA does. Also, the constitutional challenges to the ADA (discussed at the beginning of this Chapter) do not apply to state accessibility statutes.

C. Enforcing Your Rights Under the ADA and Section 504

This Part discusses other issues you should consider when deciding whether to file a claim. These issues are: (1) finding an attorney, (2) filing a complaint with the DOJ instead of in court, (3) figuring out the damages you can ask for, and (4) determining whether you can also sue under your state's anti-discrimination laws.

Before deciding to file a lawsuit under the ADA, Section 504, or any other civil rights statute, you should read Chapter 14 of the *JLM* about the Prison Litigation Reform Act ("PLRA"). If you fail to follow the PLRA's requirements, you may lose your good time credit and/or your right to bring future claims without paying the full filing fee. Make sure your attorney also knows about the PLRA—many attorneys do not.

1. Finding an Attorney

There are not enough lawyers willing and able to represent incarcerated people, in part because most lawsuits by incarcerated people do not pay lawyers well. But the ADA and Section 504 *do* allow the recovery of attorney's fees:[205] attorneys (and plaintiffs who are representing themselves) can ask for attorney's fees from defendants after winning a case. Courts have found that the PLRA rule that limits recovery of attorney's fees in lawsuits by incarcerated people[206] does *not* apply to ADA or Section 504 claims.[207] Even if you do not have a lawyer, you should ask for compensation for lawyer's fees under the ADA and Section 504. You are also entitled to recover your court, or "*in pauperis*," fees.

If you decide to sue under the ADA and Section 504, you should contact lawyers or disability rights groups in the area to see if they can assist you. You also might want to contact your state's Protection & Advocacy ("P&A") organization for advice and/or representation. P&As, which are usually

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STAT. ANN. tit. 35, § 7210.102 (2008); R.I. GEN. LAWS § 37-8-15 (2007); S.C. CODE ANN. §§ 10-5-210–330 (2007); S.D. CODIFIED LAWS § 5-14-12 (2004); TENN. CODE ANN. §§ 68-120-201–205 (2015); TEX. GOV'T CODE ANN. §§ 469.001–469.003 (2004); UTAH CODE ANN. §§ 26-29-1–4 (2007); VT. STAT. ANN. tit. 20, §§ 2900–2907 (2007); WASH. REV. CODE §§ 70.92.100–170 (2007); WIS. STAT. ANN. § 101.13 (2010).

A number of states have laws that simply require equal rights: people with disabilities have full and free use of facilities. *See, e.g.*, ARK. CODE ANN. § 20-14-303 (2017); COLO. REV. STAT. § 24-34-601 (2010); IOWA CODE § 216C.3 (West 2017); MD. CODE ANN. HUMAN SERVS. § 7-704 (West 2007); MICH. COMP. LAWS. § 37.1102 (2008); MINN. STAT. § 363A.11 (2008); NEB. REV. STAT. § 20-127 (West 2000); NEV. REV. STAT. § 233.010 (2016); VA. CODE ANN. § 51.5-44 (2018); WYO. STAT. ANN. § 35-13-201 (2007).

[203] *See, e.g.*, CONN. GEN. STAT. § 46A-7 (2018); FLA STAT. § 110.215 (2014); 775 ILL. COMP. STAT. 5/5-101, 102 (2001 & Supp. 2008); LA. REV. STAT. ANN. §§ 46:2252 TO 2254 (2015); MD. CODE. ANN. HUMAN SERVS. §§ 7-127 TO 132 (2007); N.C. GEN. STAT. § 168A-7 (WEST 2007); OR. REV. STAT. § 410.060 (WEST 2012); R.I. GEN. LAWS § 42-87-2 (2007); S.C. CODE ANN. § 43-33-520 (2015); S.D. CODIFIED LAWS § 20-13-23.7 (2016); TEX. HUM. RES. CODE ANN. §§ 22.010–.011 (VERNON 2001); UTAH CODE ANN. § 62A-5-102 (2012); VA. CODE ANN. § 51.5-40 (2018).

[204] For more information on legal research, see *JLM*, Chapter 2, "An Introduction to Legal Research."

[205] 29 U.S.C. § 794a(b) ("In any action or proceeding to enforce or charge a violation of [the Rehabilitation Act] . . . , the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fee as part of the costs."); Americans with Disabilities Act, 42 U.S.C. § 12205 ("In any action or administrative proceeding commenced pursuant to this Chapter, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs."); *see also* 28 C.F.R. § Pt. 35, App. B. (2023) (discussing 28 U.S.C. § 35.175 (2023) and specifying that "attorneys fees" include "litigation expenses and costs," which includes "items such as expert witness fees, travel expenses, etc.").

[206] Prison Litigation Reform Act, 42 U.S.C. § 1997e(d) (discussing attorney's fees in incarcerated person suits).

[207] *See* Armstrong v. Davis, 318 F.3d 965, 974 (9th Cir. 2003) (holding that the PLRA restrictions on attorney's fees do not apply to claims brought under the ADA or Section 504 because the two laws have their own attorney's fees provisions); Beckford v. Irvin, 60 F. Supp. 2d 85, 88 (W.D.N.Y. 1999) (holding that the PLRA's restrictions on attorneys fees do not apply to incarcerated people's ADA claims).

non-profit organizations, advocate on behalf of persons with disabilities, including those in criminal and civil institutions.[208] Your P&A may help you by providing information, referrals, or advice; helping you file your complaint; or even representing you. To find the P&A in your area, contact:

The National Disability Rights Network
820 First Street NE, Suite 740
Washington, DC 20002
Phone: 202-408-9514

2. Filing a Complaint

If you believe you have been discriminated against because of your disability, you can file a complaint with the DOJ[209] and/or bring a lawsuit in court.[210] Neither Title II nor Section 504 requires you to file with the DOJ, but the PLRA may require you to file with the DOJ before you sue in state court. In New York, prior to the 2005 *Rosario v. Goord* decision, several federal courts had held that incarcerated people must file a complaint with the DOJ before filing a complaint in federal court, because the PLRA requires incarcerated people to exhaust all administrative remedies.[211] However, in a 2005 decision by the Second Circuit Court of Appeals, the New York Department of Correctional Services ("DOCS")[212] said it would stop requiring incarcerated people to file their ADA claims with the DOJ before bringing suits in federal court.[213] Since most courts have not decided whether the PLRA's administrative exhaustion requirement demands that incarcerated people first file with the DOJ, you probably should do it anyway, to avoid having your ADA or Section 504 lawsuit dismissed. For more information on the PLRA, see Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

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[208] Protection and Advocacy of Individual Rights (PAIR), 29 U.S.C. § 794e(a)(1) (supporting "a system in each State to protect the legal and human rights of individuals with disabilities"); Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10803, 10805 (requiring that each state establish systems designed "to protect and advocate the rights of individuals with mental illness . . . [and] investigate incidents of abuse and neglect of individuals with mental illness"); 42 U.S.C. § 15043 (listing the systems' requirements, and noting that each system "shall have the authority to. . . pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation").

[209] 28 C.F.R. § 35.170(a), (c) (2023).

[210] 28 C.F.R. § 35.172(d) (2023).

[211] *See, e.g.*, Porter v. Nussle, 534 U.S. 516, 532, 122 S. Ct. 983, 992, 152 L. Ed.2d 12, 26, (2002) (holding that the PLRA requires incarcerated people to exhaust all administrative remedies before filing an ADA claim); William G. v. Pataki, No. 03-8331, 2005 U.S. Dist. LEXIS 16716, at *15 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) ("The DOJ remedies, to the extent that they are available to Plaintiffs, must be exhausted pursuant to the plain language of the PLRA."); Burgess v. Garvin, No. 01 Civ. 10994, 2003 U.S. Dist. LEXIS 14419, at *3, *7–9 (S.D.N.Y. Aug. 19, 2003) (*unpublished*) (holding that the PLRA requires incarcerated people to exhaust all administrative remedies, including DOJ remedies, before filing an ADA claim: "[t]he plain language of [the PLRA] requires the prisoner to exhaust 'such administrative remedies as are available.' It is not limited to administrative redress within the prison system in which the prisoner is being held, or to administrative remedies provided by any particular sovereign.").

[212] The New York State Department of Correctional Services is now called the New York State Department of Corrections and Community Supervision ("DOCCS").

[213] Rosario v. Goord, 400 F.3d 108, 109 (2d Cir. 2005) (*per curiam*) (stating that DOCS does not intend to challenge ADA lawsuits on the ground that administrative remedies have not been exhausted because complaints were not first filed with the DOJ). *But see* William G. v. Pataki, 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716, at *1–4 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (where a court, post-*Rosario*, applied the DOJ exhaustion requirement to a proposed class action on behalf of parole detainees with disabilities housed in New York city jails, and where defendants were not DOCS but the State of New York and the New York State Division of Parole and Offices of Mental Health and of Alcohol and Substance Abuse Services).

(a) Filing a Claim with the DOJ

Starting from the date of the discrimination you experienced, you have 180 days to file a complaint with the DOJ.[214] The DOJ will either investigate the complaint,[215] or, if you include a Section 504 claim and the DOJ thinks another agency can investigate better, the DOJ will refer your complaint to another agency.[216] If the agency or the DOJ finds a violation of your rights, it will try to negotiate with the prison to get them to comply with the law.[217] If the prison does not comply, the agency will refer your case to the U.S. Attorney General.[218] The Attorney General can sue the prison, but they do not have to—and in most cases, they will not.

To file a disability discrimination complaint, contact the DOJ and ask for a "Title II of the Americans with Disabilities Act Section 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form."[219] The contact information for the DOJ is:

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Civil Rights Division
Disability Rights Section - NYA
Washington, D.C. 20530
Phone.: (202) 307-0663
ADA Information Line (voice): (800) 514-0301
TTY (for hearing impaired callers): (800) 514-0383

If you do not have time to request a form, send a letter to the DOJ that includes the following:

(1) Your name, full address, and telephone number;
(2) The name of the institution that discriminated against you (for example, the prison);
(3) The address and phone number of the institution that discriminated against you;
(4) The date(s) you encountered the discrimination (and whether the discrimination is still going on);
(5) A description of the discriminatory acts, including the names of any individuals who discriminated against you;
(6) Whether you have filed a complaint or formal grievance and, if you have, what the status of your complaint or grievance is;
(7) Whether you have complained to any other agency (such as a state human rights commission or another bureau of the DOJ) or filed a court complaint about the discrimination and, if you have, the names, addresses, and phone numbers of the agencies or courts and the date(s) you filed the claim(s);
(8) Whether you plan to file with another agency or court and, if you do, the name, address, and phone number of the agency or court (even if you say you do not plan to file with another agency or court, you can change your mind later on); and
(9) Your signature and the date.

(b) Filing a Lawsuit

As mentioned above, the ADA and Section 504 do not require that you file with the DOJ, although, because of the PLRA, you may have to do so anyway. If you are in a jurisdiction that does not require you to file first with the DOJ, you may go directly to court if you have first completely used your

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[214] 28 C.F.R. § 35.170(a)–(b) (2023).

[215] 28 C.F.R. § 35.172(a) (2023).

[216] 28 C.F.R. § 35.171(a)(2)(ii) (2023).

[217] 28 C.F.R. § 35.173(a)(2) (2023).

[218] 28 C.F.R. § 35.174 (2023).

[219] U.S. Dept. of Justice, Civil Rights Division, Form No. 1190-0009, *Americans with Disabilities Act Discrimination Complaint Form* (last updated May 2019), *available at* http://www.ada.gov/t2cmpfrm.htm (last visited Feb. 25, 2024).

prison's internal grievance process.[220] If you do file with the DOJ, you can bring a lawsuit even if the DOJ does not find a violation of your rights, but you must also completely use your prison's internal grievance process. The statute of limitations (deadline) for filing a lawsuit under Title II and Section 504 depends on your state. Because neither law has its own statute of limitations, most federal courts use the statute of limitations for personal injury claims in the state.[221] Other federal courts use the statute of limitations for the most similar state law.[222] Note that some of these deadlines[223] are fairly long (six years in Minnesota),[224] while others are very short (180 days in North Carolina).[225]

To address the lack of a uniform statute of limitation and the difficulty in identifying the most similar state statute, Congress enacted a four-year statute of limitations for causes of actions "arising under an Act of Congress enacted after December 1, 1990."[226] While Title II and § 504 were enacted before December 1990, Congress has amended them since 1990; if you can show that your claim arises out of a post-1990 amendment, the § 1658 statute of limitations will apply.[227] For § 1658 to apply, you must show that the post-1990 enactment creates "a new right" or "new rights of action and corresponding liabilities", or that your claim "was made possible by a post-1990 enactment."[228]

3. What Kind of Damages Can You Seek Against a State

What you can win in court depends on the facts of your case, and on whether you sue under Title II or Section 504. You should carefully consider what you want the court to do before you file your suit.

(a) Money Damages

Courts are divided over whether you can sue a state for money damages under the ADA and Section 504. This is because they are split as to states' Eleventh Amendment immunity (also known as "sovereign immunity").

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[220] Jones v. Bock, 549 U.S. 199, 202, 127 S. Ct. 910, 914, 166 L. Ed.2d 798, 805 (2007) (requiring exhaustion of prison's internal grievance process before suit can be brought).

[221] *See* Everett v. Cobb Cty. Sch. Dist., 138 F.3d 1407, 1409 (11th Cir. 1998) (holding that Georgia's two-year personal injury statute of limitations applies to ADA and § 504 claims since Georgia has no law "identical to the Rehabilitation Act").

[222] *See, e.g.*, Wolsky v. Med. Coll. of Hampton Rds., 1 F.3d 222, 223–224 (4th Cir. 1993) (holding that the statute of limitations for the most similar state statute should be applied to Rehabilitation Act suits).

[223] In New York, the deadline is 3 years. Noel v. Cornell Univ. Med. Coll., 853 F. Supp. 93, 94 (S.D.N.Y. 1994). In California, the deadline is 1 year, although the issue remains to be definitively settled. Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1137 n.2 (9th Cir. 2002). In Illinois, the deadline is 2 years. Winfrey v. City of Chicago, 957 F. Supp. 1014, 1023 (N.D. Ill., 1997). In Georgia, the deadline is 2 years. Everett v. Cobb Co. Sch. Dist., 138 F.3d 1407, 1409 (11th Cir. 1998). In Texas, the deadline is 2 years. Hickey v. Irving Ind. Sch. Dist., 976 F.2d 980, 982–983 (5th Cir. 1992). In Pennsylvania, the deadline is 2 years. Disabled in Action of Penn. v. Southeastern Penn. Transp. Co., 539 F.3d 199, 208 (3d Cir. 2008). In Louisiana, the deadline is 1 year. Joseph v. Port of New Orleans, Civil Action No. 99-1622 Section "N", 2002 U.S. Dist. LEXIS 4133, *49–51 (E.D. La. Mar. 4, 2002) (*unpublished*).

[224] Faibisch v. Univ. of Minn., 304 F.3d 797, 802 (8th Cir. 2002) (holding that Minnesota's six-year personal injury statute of limitations applies to Rehabilitation Act suits).

[225] McCullough v. Branch Banking & Tr. Co., 35 F.3d 127, 132 (4th Cir. 1994) (holding that the statute of limitations for Rehabilitation Act claims is determined by the most similar state law; in North Carolina, the most similar state law was a state antidiscrimination law with a deadline of 180 days, so the deadline for filing a Section 504 complaint became 180 days). McCullough v. Branch Banking & Trust Co., 35 F.3d 127, 130 (4th Cir. 1994). The *McCullough* court noted that it was following its decision in Wolsky v. Med. Coll. of Hampton Rds., 1 F.3d 222, 223–224 (4th Cir. 1993), where the court found that, because (1) Virginia had its own act protecting disabled individuals, and (2) that act had the same purpose as the federal Rehabilitation Act, the Virginia Act was the most analogous statute, and its one-year statute of limitations should be used, rather than the statute of limitations for personal injury suits.

[226] 28 U.S.C. § 1658.

[227] Frame v. City of Arlington, 657 F.3d 215, 236–237 (5th Cir. 2011).

[228] Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369, 381–382, 124 S. Ct. 1836, 1844–1845, 158 L. Ed. 2d 645, 656–657 (2004).

Under the Eleventh Amendment, states (but not federal or local government) have what is called "sovereign immunity."[229] This means individuals cannot sue them for money in federal court—unless Congress creates an exception. It is true that both the ADA and Section 504 apply to state-incarcerated people.[230] But it is not clear whether states have waived their immunity, so that you can sue them for money damages under those laws.

States do not want to have to pay money when they lose lawsuits. So, they argue that, in enacting the ADA and Section 504, Congress did not have the authority to create an Eleventh Amendment exception to sovereign immunity. Therefore, states argue, people bringing claims under the ADA and Section 504 should not be able to win money damages against the states. Once courts decide that states cannot be sued for money damages, individuals suing states can only receive "injunctive relief,"[231] discussed in subsection (b), below.

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(b) Sovereign Immunity and the ADA

The Supreme Court has taken the middle road between allowing and not allowing state prisons to be sued for money damages under Title II of the ADA. In *Tennessee v. Lane*, the Supreme Court held that states may be sued for money damages for violations of Title II, at least when the violations relate to court access for a disabled person.[233] Before *Lane*, most federal courts had held that states could not be sued for money damages at all.[234] Then after *Lane*, in *United States v. Georgia*, the Supreme Court

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[229] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363, 121 S. Ct. 955, 962, 148 L. Ed. 2d 866, 877 (2001).

[230] Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956, 141 L. Ed.2d 215, 221 (1998) (holding that Title II of the ADA applies to incarcerated people in state prisons); Harris v. Thigpen, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (ruling that § 504 applies to incarcerated people in state prisons because state prisons receive money from the federal government); Bonner v. Lewis, 857 F.2d 559, 562–563 (9th Cir. 1988) (ruling that § 504 applies to state correctional institutions that receive federal funding).

[231] United States v. Georgia, 546 U.S. 151, 155, 126 S. Ct. 877, 879, 163 L. Ed. 2d 650, 657 (2006); Miller v. King, 384 F.3d 1248, 1263–1267 (11th Cir. 2004), *vacated and superseded on other grounds*, Miller v. King, 449 F.3d 1149 (11th Cir. 2006).

[232] United States v. Georgia, 546 U.S. 151, 155, 126 S. Ct. 877, 879, 163 L. Ed. 2d 650, 657 (2006); Miller v. King, 384 F.3d 1248, 1263–1267 (11th Cir. 2004), *vacated and superseded on other grounds*, Miller v. King, 449 F.3d 1149 (11th Cir. 2006).

[233] Tennessee v. Lane, 541 U.S. 509, 531, 124 S. Ct. 1978, 1993, 158 L. Ed. 2d 820, 842 (2004).

[234] Prior to *Lane*, the First, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals ruled that individuals may not receive money damages under Title II. Many of these cases stated that Congress created a remedy that was not "congruent" nor "proportional," meaning the remedy was inappropriate, to the harm the remedy was supposed to address. *See* Kiman v. N.H. Dept. of Corr., No.01-134-B, 2001 U.S. Dist. LEXIS 21894, *2–3 (D.N.H. Dec. 19, 2001) (*unpublished*) (agreeing with the Second, Fifth, and Tenth Circuits that, under Garrett, the 11th Amendment does not allow courts to hear Title II claims against states), *aff'd*, Kiman v. N.H. Dept. of Corr., 332 F.3d 29 (1st Cir. 2003) (en banc), *vacated*, Kiman v. N.H. Dept. of Corr., 541 U.S. 1059, 124 S. Ct. 2387, 158 L. Ed. 2d 961 (2004); Wessel v. Glendening, 306 F.3d 203, 215 (4th Cir. 2002) (holding that while Congress expressed its intent to diminish state sovereign immunity, it acted without enough information and created a remedy that was not proportionate nor congruent), *overruled by* Constantine v. Rectors & Visitors of George Mason Univ., 441 F.3d 474, 486 n.8 (4th Cir. 2005); Reickenbacker v. Foster, 274 F.3d 974, 983 (5th Cir. 2001) (holding that Title II and § 504 are not proportional and congruent responses to legislative findings of unconstitutional discrimination by the states against the disabled), *overruled by* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 277 n.14 (5th Cir. 2005); Thompson v. Colorado, 278 F.3d 1020, 1034 (10th Cir. 2001) (holding that Title II cannot be found to be a proportional and congruent response to constitutional violations if Congress has not identified a history and pattern of unconstitutional discrimination by the states); Walker v. Snyder, 213 F.3d 344, 346–347 (7th Cir. 2000) (holding that, like Title I, Title II is barred by the 11th Amendment), *overruled by*

held that incarcerated people may sue states for money damages under Title II, at least in situations where the alleged misconduct *actually* violates the parts of the Constitution that apply to the states.[235] In that case, the plaintiff alleged Eighth Amendment violations.[236] However, the ruling is broad, and applies to more than just the Eighth Amendment. The court did not say whether the waiver of sovereign immunity under the Eleventh Amendment also applies to ADA violations that do not involve constitutional violations.[237]

So, the current rule is that incarcerated people may sue states for money damages under Title II when a state prison system (1) violates any of the rights that are part of the Fourteenth Amendment *and* (2) violates Title II.[238] The Fourteenth Amendment makes most of the rights in the first eight amendments to the Constitution apply against the states. Specifically, it includes the following rights from the first eight amendments:

(1) Guarantee against establishment of religion;[239]
(2) Guarantee of free exercise of religion,[240]
(3) Guarantee of freedom of speech,[241]
(4) Guarantee of freedom of the press,[242]
(5) Guarantee of freedom of assembly,[243]
(6) Right to keep and bear arms,[244]
(7) Right to be free from unreasonable search and seizure,[245]
(8) Warrant requirements,[246]
(9) Protection against double jeopardy,[247]
(10) Privilege against self-incrimination,[248]

Bruggeman v. Blagojevich, 324 F.3d 906, 912–913 (7th Cir. 2003); Alsbrook v. City of Maumelle, 184 F.3d 999, 1002 (8th Cir. 1999) (finding that Title II is not a valid exercise of Congress' power under § 5 of the 14th Amendment, and so Arkansas retains its 11th Amendment immunity). The Second Circuit had ruled that individuals may not receive money damages under Title II of the ADA unless they can show that the state acted with "discriminatory animus or ill will" toward the disabled. Garcia v. State Univ. of N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 111 (2d Cir. 2001). The Sixth Circuit had allowed money damages against the state under Title II only if the discrimination amounted to a violation of an individual's due process rights under the 14th Amendment. Lane v. Tennessee, 315 F.3d 680, 682–683 (6th Cir. 2003) (holding that "it was reasonable for Congress to conclude that it needed to enact [the ADA] to prevent states from unduly burdening" rights protected by the 14th Amendment), *aff'd*, Lane v. Tennessee, 541 U.S. 509, 534, 124 S. Ct. 1978, 1994, 158 L. Ed. 2d 820, 844 (2004). Only the Ninth Circuit has held that individuals may sue the state for money damages under Title II. Hason v. Med. Bd. of Cal., 279 F.3d 1167, 1171 (9th Cir. 2002) (holding that Congress validly diminished states' 11th Amendment immunity when enacting Title II).

235 United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006).

236 United States v. Georgia, 546 U.S. 151, 160–161, 126 S. Ct. 877, 883, 163 L. Ed. 2d 650, 661 (2006) (Stevens, J., concurring).

237 United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006); Miller v. King, 384 F.3d 1248, 1263–1267 (11th Cir. 2004), *vacated and superseded on other grounds*, Miller v. King, 449 F.3d 1149 (11th Cir. 2006).

238 United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006).

239 Everson v. Bd. of Educ., 330 U.S. 1, 14–15, 67 S. Ct. 504, 511, 91 L. Ed. 711, 723 (1947).

240 Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1217–1218 (1940).

241 Hustler Magazine v. Falwell, 485 U.S. 46, 50–51, 108 S. Ct. 876, 879, 99 L. Ed. 2d 41, 48–49 (1988).

242 Near v. Minnesota, 283 U.S. 697, 707, 51 S. Ct. 625, 628, 75 L. Ed. 1357, 1363 (1931).

243 De Jonge v. Oregon, 299 U.S. 353, 364, 57 S. Ct. 255, 260, 81 L. Ed. 278, 284 (1937).

244 McDonald v. City of Chicago, 561 U.S. 742, 749–750, 130 S. Ct. 3020, 3026, 177 L. Ed. 2d 894, 903 (2010).

245 Mapp v. Ohio, 367 U.S. 643, 654–655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1089–1090 (1961).

246 Aguilar v. Texas, 378 U.S. 108, 110, 84 S. Ct. 1509, 1512, 12 L. Ed. 2d 723, 726 (1964).

247 Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 2058, 23 L. Ed. 2d 707, 711 (1969).

248 Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct.1489, 1492, 12 L. Ed.2d 653, 658 (1964).

(11) Protection against taking of private property without just compensation,[249]
(12) Right to a speedy trial,[250]
(13) Right to a public trial,[251]
(14) Right to trial by jury,[252]
(15) Right to question opposing witnesses,[253]
(16) Right to assistance of counsel,[254]
(17) Protection against cruel and unusual punishment.[255]

Additionally, the Fourteenth Amendment itself provides that:

(1) No State shall make or enforce any law which shall abridge the privileges or immunities of U.S. citizens;
(2) No State shall deprive any person of life, liberty, or property without due process of the law; and
(3) No State shall deny equal protection of the law.[256]

If any of these rights are violated in addition to a violation of Title II, you may be able to sue for money damages. It appears that, after *Lane* and *Georgia,* lower courts will take a case-by-case approach, considering the particular circumstances, in determining whether the plaintiff can sue the state for money damages.[257] Some courts will be more likely than others to permit money damages.[258]

If you are considering bringing a disability discrimination claim under Title II, you should look at how the decisions in *Lane* and *Georgia* have been analyzed and interpreted by other courts, disability

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[249] Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236–237, 17 S. Ct. 581, 584–585, 41 L. Ed. 979, 984–985 (1897).

[250] Klopfer v. North Carolina, 386 U.S. 213, 222–223, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 7–8 (1967).

[251] *In re* Oliver, 333 U.S. 257, 266–268, 68 S. Ct. 499, 504–505, 92 L. Ed. 682, 690–691 (1948).

[252] Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (1968).

[253] Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965).

[254] Gideon v. Wainwright, 372 U.S. 335, 342, 83 S. Ct. 792, 795, 9 L. Ed. 2d 799, 804 (1963).

[255] Robinson v. California, 370 U.S. 660, 667, 82 S. Ct. 1417, 1420–1421, 8 L. Ed. 2d 758, 763 (1962).

[256] U.S. CONST. amend. XIV, § 1.

[257] *See* United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006). In *United States v. Georgia*, the Supreme Court held that lower courts were in the best position to determine (1) which aspects of the State's alleged conduct violated Title II of the ADA, and (2) to what extent such conduct also violated the 14th Amendment. Additionally, the Supreme Court held that when lower courts find that the State's conduct violated Title II but did not violate the 14th Amendment, lower courts should determine whether Congress intended that people should still have a right to sue the states for money damages. Since *United States v. Georgia*, a number of courts have allowed incarcerated people to sue for monetary damages when they establish both that (1) the state prison system violated Title II of the ADA, and (2) the actions of the state prison system violated incarcerated people's 14th Amendment rights. Degrafinreid v. Ricks, 417 F. Supp. 2d 403, 411–413 (S.D.N.Y. 2006) (ruling that an incarcerated person could bring a claim for money damages against his prison system for confiscating and destroying his hearing aid; the prison's actions might have violated the incarcerated person's 8th Amendment right to be free from cruel and unusual punishment).

However, in the past, courts have been hesitant to allow incarcerated people to sue for monetary damages when a State's actions violate Title II but not a 14th Amendment constitutional right. *See, e.g.*, Miller v. King, 384 F.3d 1248, 1272–1275 (11th Cir. 2004), *vacated and superseded on other grounds*, Miller v. King, 449 F.3d 1149 (11th Cir. 2006) (noting that Title II damages suits may only be brought where the ADA provides an "appropriate . . . response to [a] . . . history and pattern of unconstitutional treatment. . . . specifically in the prison context," and finding that, because "Title II addresses all prison services, programs, and activities—and goes well beyond the basic, humane necessities guaranteed by the Eighth Amendment," the incarcerated person could not bring a Title II damages suit against the state); Flakes v. Franks, 322 F. Supp. 2d 981, 983 (W.D. Wisc. 2004) (noting that it was not clear whether the incarcerated person's Title II claim for money damages against the state could go forward because the court had not yet reviewed all of the facts the incarcerated person might include in his complaint).

[258] *See, e.g.*, Phiffer v. Columbia River Corr. Inst., 384 F.3d 791, 792–793 (9th Cir. 2004) (upholding a prior decision permitting an incarcerated person to bring a Title II claim for damages against the state); *see also* Carrasquillo v. City of New York, 324 F. Supp. 2d 428, 442 (S.D.N.Y. 2004) (noting that *Lane* permits Title II claims for money damages against state and local governments but dismissing the claim on other grounds).

rights organizations, and academics. See *JLM*, Chapter 2, "Introduction to Legal Research," for information on performing legal research.

(c) Sovereign Immunity and Section 504

Courts are divided over whether states are protected by sovereign immunity under Section 504. Most courts of appeals that have addressed this issue have held that you *can* seek monetary damages under Section 504.[259] However, the Second Circuit has held that you *might* not be able to get monetary damages from states under Section 504, since states only agreed to be sued for money damages under Title II, and not Section 504.[260]

Overall, though, the arguments supporting Section 504 sovereign immunity are weak. This is because so many state agencies receive federal funding, and Congress only offers them federal funding in exchange for complying with Section 504—and in doing so waiving their state's sovereign immunity. Therefore, even Second Circuit courts would find that, in reality, most states have waived their sovereign immunity under Section 504 and can be sued for money damages. However, in some courts, you may still not be able to get money damages against a state under Section 504.[261]

(d) Some Practical Tips

To receive money damages, you have to convince the court that the state has waived its sovereign immunity. Generally, this is easier under Section 504 than under the ADA. However, this area of the law is changing. If you plan to file a Title II or Section 504 lawsuit, you should research this issue **thoroughly** to determine current law in your circuit**.** See *JLM*, Chapter 2, "Introduction to Legal Research," for help in determining what the current law is. (Although "Shepardizing"[262] cases in LexisNexis is a good place to start, you should do additional research to make sure you are using up-to-date laws.)

If you find that you live in a federal circuit that prohibits money damages in such suits, you still can file a lawsuit against the state. However, you will only be able to receive relief that is injunctive (ordering the prison to take certain actions) and/or declaratory (determining applicable rights under

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[259] *See* Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1293 (11th Cir. 2003) (explaining that states waive their 11th Amendment immunity to § 504 suits when they receive federal funds); A.W. v. Jersey City Pub. Schs., 341 F.3d 234, 238 (3d Cir. 2003) (stating that Congress clearly required states to waive their immunity if they accepted federal funding); Doe v. Nebraska, 345 F.3d 593, 604 (8th Cir. 2003) (holding that the state knowingly waived its immunity by accepting federal funds, despite the state's claims that it thought it had already waived immunity through prior actions); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) (stating that "it is clear that a state waives its immunity from suit under the Rehabilitation Act by accepting federal funds"); Carten v. Kent State Univ., 282 F.3d 391, 398 (6th Cir. 2002) (finding, as it did in an earlier case, that the state "unambiguously waived Eleventh Amendment immunity against Rehabilitation Act claims when it agreed to accept federal funds pursuant to" a federal act requiring states that accept such funds to waive their immunity); *see also* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 280–287 (5th Cir. 2005) (*en banc*) (holding that, by accepting federal financial assistance, the state waived its 11th Amendment immunity to suits under § 504).

[260] Garcia v. State Univ. of N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 114 (2d Cir. 2001). *Garcia* does not say that the state can *never* be sued for money damages under Section 504, but it requires that the state—when it accepted federal funds—believed it was giving up its immunity from suits for money damages. It is not clear at what point courts will find that states *knew* they could be sued. *See* Press v. State Univ. of N.Y., 388 F. Supp. 2d 127, 132–133 (E.D.N.Y. 2005) (discussing subsequent treatment of *Garcia* in the Second Circuit after *Lane*). As such, if you are in the Second Circuit, you may want to include a claim for money damages under § 504. But keep in mind the "three strikes" provision of the PLRA (*see* Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," to learn more about the PLRA).

[261] *See* Howard v. Bureau of Prisons, No. 3:05-CV-1372, 2008 U.S. Dist. LEXIS 7997, at *12–13 (M.D. Pa. Feb. 1, 2008) (*unpublished*).

[262] "Shepardizing" a case means checking to see how it has been treated since it was published to make sure it is still valid. If LexisNexis indicates that a case has been treated negatively, that could mean that the entire case has been overturned and is no longer valid, that the case has been partly overturned but remains good law for the point you want to cite it for, that the holding of the case has been revised or modified by later cases, or something else. Thus, while the "Shepard" signals provided by LexisNexis are useful, further research is often necessary to determine whether or not you can rely on a case. *See* Chapter 2 of the *JLM*, "Introduction to Legal Research."

the statute) and not money damages.[263] Even if you are able to sue for money damages, you cannot receive punitive damages under Title II or Section 504.[264]

You should probably cite both the ADA and Section 504 when filing your claim (so long as both of those laws apply to you). Then, if the Supreme Court ever rules that Congress exceeded its power in enacting one of those laws, your claim for money damages still will be viable against a state prison if (1) it includes claims against the law that is still in effect, and (2) you are in a jurisdiction that allows suits for money damages under the law that is still in effect.

(e) Injunctive Relief

Even when you cannot sue the state for money damages, you can ask for injunctive relief.[265] Injunctive relief is when the court orders the prison to take certain actions (for example, to provide interpreters to hearing-impaired incarcerated people during disciplinary hearings)[266] or not to take certain actions (for example, to stop excluding incarcerated people with HIV from certain programs).[267] If you are seeking injunctive relief, you *must* make your claim for an injunction against individual prison officials in their *official capacities*.[268] Under the ADA and Section 504, you cannot sue individual officials in their *individual capacities*. For example, if you sue Prison Warden John Smith, you will be suing him as the Warden (who represents the state), not as Mr. John Smith (who just represents himself). Although *the state* will be providing the injunctive relief the court orders, the law requires you to request the injunctive relief from *specific officials*. (If you are suing a *county*, however, you can ask for injunctive relief directly from the county or the county jail.)

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[263] Remember that in lawsuits against the federal government, you can seek only injunctive relief (a court-ordered act or prohibition) and declaratory relief (the judge's determination of each party's rights). You cannot get money damages. For a reminder of this information, see Section B(1) of this Chapter.

[264] *See* Barnes v. Gorman, 536 U.S. 181, 189, 122 S. Ct. 2097, 2103, 153 L. Ed. 2d 230, 239 (2002) (stating that "punitive damages may not be awarded . . . in suits brought under Section 202 of the ADA and Section 504 of the Rehabilitation Act").

[265] *See* Randolph v. Rodgers, 253 F.3d 342, 345 (8th Cir. 2001) (noting that a "private party may seek prospective injunctive relief in federal court against a state official, even if the state is otherwise protected by Eleventh Amendment immunity"). "Eleventh Amendment immunity" means sovereign immunity. When you sue a state official in his official capacity for injunctive relief, it is called an *Ex parte Young* suit. *Ex parte Young* is the Supreme Court case allowing state officials to be sued for injunctive relief even when the state itself cannot be sued. *Ex parte* Young, 209 U.S. 123, 155–156, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

[266] Duffy v. Riveland, 98 F.3d 447, 454–455 (9th Cir. 1996) (finding that a deaf incarcerated person was disabled and could make a claim under § 504 where the incarcerated person might be entitled to a certified interpreter at disciplinary hearings).

[267] See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," which discusses the different types of relief and remedies available in a lawsuit.

[268] Henrietta D. v. Bloomberg, 331 F.3d 261, 287–288 (2d Cir. 2003) (distinguishing between individual and official capacity and explaining that defenses that apply to individuals do not apply to entities); Bruggeman *ex rel.* Bruggeman v. Blagojevich, 324 F.3d 906, 912–913 (7th Cir. 2003) (explaining that *Ex Parte Young* permits state officials (and not just *states*) to be sued in their official capacities for injunctive relief); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1187–1188 (9th Cir. 2003) (finding "no difference between declaring that a named officer in her official capacity represents the 'State' for purposes of the Fourteenth Amendment, and declaring that the same officer represents a 'public entity' under Title II," and "holding that Title II's statutory language does not prohibit Miranda B.'s injunctive action against state officials in their official capacities"); Carten v. Kent State Univ., 282 F.3d 391, 395–396 (6th Cir. 2002) (affirming that *Ex Parte Young* creates "an exception to Eleventh Amendment immunity for claims for injunctive relief against individual state officials in their official capacities," so that the plaintiff chose his defendant correctly in this suit); Randolph v. Rodgers, 253 F.3d 342, 345 (8th Cir. 2001) (affirming lower court's ruling that prison officials could be sued in their official capacities despite 11th Amendment immunity); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9, 121 S. Ct. 955, 968 n.9, 148 L. Ed. 2d 866, 884 n.9 (2001) (noting that its decision that states may not be sued for money damages under ADA Title I does not prevent a person from bringing a claim for injunctive relief).

4. Filing an ADA or Section 504 Claim Against a County, City, or Town

The Eleventh Amendment/sovereign immunity challenges to the ADA and Section 504 do not apply to local entities like counties, cities, and towns.[269] So you can ask for money damages (as well as injunctive relief) if you sue a county, city, or town for violating your rights under these laws. Also, if you are in a private prison that receives federal financial assistance, you can sue the prison for money damages and injunctive relief under Section 504. But punitive damages are never available under Title II or Section 504.[270]

5. Filing in State or Federal Court

Most suits about the rights of incarcerated people with disabilities have been brought in federal court. However, in recent years, the Supreme Court has weakened the protections of the ADA (and federal courts have followed the Supreme Court). This makes *state* courts an appealing alternative. As explained above, state laws (1) can incorporate or expand ADA protections, and (2) do not have the constitutional weaknesses of the ADA and Section 504. If you are in a state where federal case law has limited your ability to sue the state, you should research the possibility of filing in state court and using state law. You should make sure to find out how your state's courts have dealt with suits by incarcerated people brought after the decisions in *Lane* and *Georgia*, which dealt with Eleventh Amendment/sovereign immunity. See Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit," for general information about state versus federal court.

D. Conclusion

If you are an incarcerated person with a physical or mental disability, Section 504 and the ADA (and maybe state law as well) guarantee you certain rights and protections. To realize your protections under these laws, you must meet the elements of the two laws. You may be able to hire an attorney to assist you with your complaint, because both Section 504 and the ADA allow you to recover attorney's fees. Although you might not be able to recover money damages, you may be able to change the practices that are denying you a particular prison service, program, or activity. Before filing your complaint, make sure to refer to Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for information about the PLRA (which may impose additional requirements before filing a lawsuit). Also, if you claim a violation of a state statute, make sure you meet your state's statute of limitations.

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[269] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369, 121 S. Ct. 955, 965, 148 L. Ed.2d 866, 880 (2001) (noting that "the Eleventh Amendment does not extend its immunity to units of local government," so local entities are "subject to private claims for damages under the ADA").

[270] Barnes v. Gorman, 536 U.S. 181, 189, 122 S. Ct. 2097, 2103, 153 L. Ed.2d 230, 239 (2002) ("Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act").